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JANUARY TO DECEMBER 1916.

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BY THE BENGAL SECRETARIAT LEGISLATIVE DEPARTMENT, BOOK DEPOT BRANCH
WRITERS' BUILDINGS, CALCUTTA.

plot, there is no reason to suppose that the portion not printed, to some passage in which the learned Judge presumably refers, does not bear out his statement of their contents.

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It was argued that as under section 65 of the

To be substituted for pages 983-84 of November volume, 1916.

any documentary evidence may be given.

The appeal must, however, in my opinion, succeed on the ground that the assessment complained of is barred by section 28 of the Assam Land and Revenue Regulation, 1886. It is argued for the respondent that the right of Government to assess land-revenue which, as is pointed out in the preambles to Regulations XIX and XXXVII of 1793, is based on the ancient law of the country, can never be barred. As to the position stated in those general terms, it is not necessary to express an opinion. For it is clear that Government can divest itself of the right to assess revenue and can make such regulations for the guidance of its officers as will have the same practical result as a renunciation of the right to assess revenue. Now, the Assam Land and Revenue Regulation has repealed the Bengal Regulations, so far as they apply to territories to which the Regulation has been extended, so the only provisions for assessment of land-revenue extant in Sylhet are those to be found in the Regulation itself. Section 28 provides that all land shall be deemed liable to be assessed to revenue, subject to exceptions in favour of two classes of land, and subject also to certain provisos. Exemption is claimed under the 4th proviso which declares that nothing in the section shall "authorise the assessment

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of any land which has been held revenue-free for 60 years continuously unless it is shown that the right so to hold has ceased to exist." The learned Advocate-General argued that the words "held revenue-free" meant so held "as of right," but he was not prepared to argue that they could not mean merely "held without payment of revenue," apart from any question of the right so to hold the land.

I think that if the former meaning had been intended it would have been expressed in definite terms, and that the meaning to be attached to the words is the alternative one suggested. The proviso then would seem intended to reproduce the rule of 60 years' limitation provided by section 2 of Regulation II of 1805. It is also definitely enacted that the proviso is made inapplicable if it be shown in the case of land so held that the right so to hold it has ceased to exist. The qualification is probably intended to save the land-revenue in cases where at some time the land has been rightly held without payment of revenue within the 60 years. The effect of the proviso appears to be to save the land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within the 60 years there was a cessation of the assessee's right to so hold it. If it were sufficient for Government to show that at any time, even before the 60 years, the owner had no right to hold the land revenue-free or had lost the right, the practical effect of the proviso would be merely to raise a presumption in favour of freedom from assessment after 60 years holding without payment of revenue. If that had been the intention, I think it would have been expressed in simpler language. It seems to be a case of an exception within an exception. So that if in fact there has never been



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CONTAINING

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FROM ALL OTHER COURTS IN BRITISH
INDIA [EXCEPT THE COURT OF THE
JUDICIAL COMMISSIONER OF
OUDH] NOT SUBJECT TO
ANY HIGH COURT.

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HIGH COURT, CALCUTTA

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WRITERS' BUILDINGS, CALCUTTA.

THE HIGH COURT.

1916.

Chief Justice :

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Puisne Judges :

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" SIR HERBERT HOLMWOOD, K.T. (*Retired*).
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" E. P. CHAPMAN * (*Additional*).
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(*Retired*).

- " SIR SATYENDRA SINHA, *Advocate-General*
(*offg.*)
" B. C. MITTER, *Standing Counsel*.

* Appointed Judge of the Patna High Court from the 1st March, 1916.

CORRIGENDA.

- Page 4, line 15, *for* "interpreted" *read* "interpreted by."
- Page 251, line 3 from bottom (ref.), *for* "161" *read* "162."
- Page 327, last line (ref.), *for* "L. B." *read* "L. R."
- Page 432, line 11 (head note), *for* "living" *read* "leaving."
- Page 505, line 10 from bottom (ref.), *for* "1 B. L. R." *read* "11 B. L. R."
- Page 509, line 26, *for* "Alijan" *read* "Alikj m".
- Page 511, line 3 from bottom (ref.), *for* "A. C. 851" *read* "A. C. 351."
- Page 567, line 2 from bottom (ref.), *for* "(1907) C. L. J." *read* "(1907) 7 C. L. J."
- Page 585, last line (ref.), *for* "4 Mad." *read* "4 Mac."
- Page 625, line 3 from bottom (ref.), *for* "L. B. R." *read* "4 L. B. R."
- Page 632, line 5 from bottom (ref.), *for* "[1891]" *read* "[1892]."
- Page 759, line 13, *for* "claimant" *read* "claimants."
- Page 791, line 11, *for* "Blackwell" *read* "Blackwall."
- Page 813, last line (ref.), *for* "20 Q. B. D. 268" *read* "20 Q. B. D. 368."
- Page 857, line 15 (head note), *for* "Hall" *read* "Hale."
- Page 928, last line (ref.), *for* "9 C. L. J." *read* "11 C. L. J."
- Page 944, line 3 from bottom (ref.), *for* "4. C. L. R. 302" *read* "4 C. L. R. 538."
- Page 949, last line but one (ref.), *for* "3 W. R. 21" *read* "3 W. R. 49."
- Page 1053, line 3 (head-note), *for* "Owlandson" *read* "Rowlandson."
- Page 1162, last line (ref.), *for* "28 Calc. 25" *read* "28 Calc. 253."

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Bengal Tenancy Act (VIII of 1885) s. 104—*Its amendment in 1893—Effect of s. 102—Settlement Officer, power of.* Section 102 of the Bengal Tenancy Act has now been amended by the insertion of a new clause which expressly authorises the Settlement Officer to decide when the land is claimed to be held rent-free—whether or not rent is actually paid, and if not paid, whether or not the occupant is entitled to hold the land without payment of rent, and if so entitled under what authority. The very circumstance that the Legislature has inserted this clause in section 102 points to the conclusion that the matter provided for therenunder is not covered by the other clause of section 102. The Legislature could not possibly have intended to accord finality to a decision of a dispute by a Settlement Officer which it was beyond the jurisdiction of the Revenue Officer to decide under section 106 of the Bengal Tenancy Act. *Ratha Kishore v.*

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jute to E. D. S. & Co. for shipment to London. The contract contained a clause in writing, known in the export trade as "a Home Guarantee" that is, a clause by which the Calcutta seller guaranteed the weight, condition and quality at the port of destination. E. D. S. & Co. sold the jute to a London buyer, who claimed an allowance for inferiority of quality; and upon an arbitration in London an award was given against E. D. S. & Co. R. D. & Co. brought this suit in Calcutta against E. D. S. & Co. to recover the price of the 500 bales of jute. E. D. S. & Co. contended that they were not liable on the ground that under the terms of the contract R. D. & Co had guaranteed the condition and quality of the goods at the port of destination; that by the award the goods had been invoiced back to the sellers; and that in terms of the contract R. D. & Co were bound by the award. Held, that the clause in writing, that is to say the home guarantee, does not mean that a London award is a submission by the Calcutta purchaser and the London purchaser in accordance with the rules and conditions of the London Association contract of 1902.

ger to the London submission there should be a clear and unambiguous agreement to that effect. Held, also, that although it may be correctly contended that any dispute about quality, between the Calcutta seller and the Calcutta buyer may be validly referred to arbitration in London in accordance to that clause, the meaning of the clause cannot be extended so as to make an award between the Calcutta purchaser and the London purchaser binding upon the Calcutta seller. RAM DUTT RAMKISSEY DAS v. E. D.

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under the former: *Held*, that the intent to commit an offence or to intimidate, insult or annoy not having been established, the conviction was bad. If a person enters upon land in the possession of another, in the exercise of a *bona fide* claim of right without any such intent, he cannot be convicted under s. 447, though he may have no right to the land. *Empress v. Budh Singh*, I. L. R. 2 All 101, *Re Shikshikur Parui*, 9 B. L. R. App 19, and *Jurakhan Singh v. King-Emperor*, 7 C. L. J. 238, followed. *Akshoy Singh v. RAMESWAR BAGNI*, (1916) I. L. R. 43 Calc.

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of the breach of the contract, sold the shares at various dates from 28th February to October, in every case except one at a higher price than 4.3. In a suit brought on 22nd March 1912 by the appellant for the amount demanded, the Chief Court allowed the respondents the benefit of the increased prices received by sale of the shares by giving them, in mitigation of damages, credit for the prices realised over and above the market price on 30th December, on the date of the breach.—*Held* by the Judicial Committee (reversing that decision), that on the breach by the respondents their contractual right to the shares fell to the ground, and the appellant thereafter sold shares belonging to himself in order to ascertain the loss arising by reason of the respondents not completing at the contract price. If after the breach the seller holds on to the shares, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer: the seller cannot recover from the buyer the loss below the market price at the date of the breach, if the market falls, nor is he liable to the buyer if the market rises. A plaintiff who sues for damages is bound to take all reasonable steps to mitigate the loss consequent on the breach, and cannot claim any sum due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. *Staniforth v. Lyall*, 7 Bing. 169, followed. The fact that by reason of the loss of the contract which the defendant has failed to perform, the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract. *Yates v. Whyle*, 4 Bing. N. C 272, *Bradburn v. Great Western Railway Co.*, L. R. 10 Exch. 1, and *Jebson v. East and West India Dock*, L. R.

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10 C. P. 300, followed. The market rate of the breach is the decisive element *Rodocanachi v. Millburn*, L. R. 18 Q. B. D. 67, and *Williams v. Agins*, [1914] A.C. 10, followed. This principle applies to a breach by either seller or buyer. Neither section 73 nor 107 of the Contract Act (IX of 1872) could be referred to as in favour of the respondents : the former was only declaratory of the right to damages, and the latter was inapplicable to the present case. *JAMAL v. MOILLA DAWOOD Sons & Co.* (1915) I. L. R. 43 Calc 493

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suit for—*Specific Relief Act (I of 1877)*, s. 42—*Suit by alleged reversioner for declaration of title—Legal interest or character necessary to support claim—Suit to revoke probate after will had been affirmed by Probate Court—Suit by reversioner to prevent waste by Hindu widow, not analogous—Rule of res judicata origin and application of—Rule existing in Hindu as well as English law.* On an application to the District Court, by the first respondent, for probate of the will of *B*, a Hindu who died leaving two widows but no male issue, the appellants entered a caveat denying the genuineness of the will, and asserting that they were the reversioners of *B* and had, therefore, a *locus standi* to oppose the grant of probate. The District Court held that the caveators had failed to prove their interest, and granted probate of the will to the first respondent as executor by implication. The High Court on appeal affirmed that decision, and the appellants without any further appeal instituted a suit in the Subordinate Judge's Court against the

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first respondent and the two widows for a declaration that they were the next reversioners to the estate of *B* according to Hindu Law in the case of an intestacy, and as such were entitled to obtain revocation of probate. The first Court gave them a decree but on appeal the High Court held that the suit was barred by section 13 of the Civil Procedure Code, 1882, as being *res judicata* by the decision of the District Court in the probate proceedings. Held by the Judicial Committee (without deciding the question of *res judicata*), that the suit was not maintainable with reference to section 42 of the Specific Relief Act (I of 1877) : the will had been affirmed by a Court of appropriate jurisdiction, and its decision could not be impugned by a Court exercising a different jurisdiction : for the purposes of the suit the will must stand, and there was no intestacy. The appellants had therefore shown no legal character or title which would justify them

right of a reversioner to sue where a widow in possession for her life estate was committing acts of waste to the prejudice of those who might succeed to the property on her death, was not analogous : such a position necessarily assumed the absence of an immediate and absolute testamentary disposition. Suits of that kind formed a very special class, and the question in them was one solely between the reversioner and the widow, the former being unable by such a suit to get, as between himself and a third party, an adjudication of title which he could not obtain without it. *Kathama Natchiar v. Dorasiga Tever*, L. R. 2 I. A. 162, referred to. Semble. The rule of *res judicata* while founded on ancient precedent is

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dictated by a wisdom which is for all time; see 6 Coke's Institutes 9A. Though the rule may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu Commentator. Vijnaneshvara and Nilakantha include the plea of a former judgment among those allowed by law, citing for this purpose a text of Kalyana; see Mitakshara (Vayavahara), Book II, Ch. I (edited by J. R. Gharpure), p. 14; and Mayukha, Ch. I, s. 1, p. 11 of Mandlik's edition. The application of the rule by the Courts in India should therefore be influenced by no technical considerations of form but by matter of substance within the limits allowed by law. **SHEOPARSHAN SINGH v. RAMAYANDAN PRASAD SINGH** (1916) I. L. R. 43 Calc.

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creditor was benamidar of the judgment-debtor—Deposit by garnishee, conditional, on enquiry—Withdrawal of the money from Court by the attaching creditor without notice to the garnishee—Courts power of enquiry. Where debt due to a stranger was attached on the allegation that he was *benamidar* of the judgment-debtor and the attaching creditor withdrew the money by leave of the Court without notice to the garnishee, in a suit by the latter for the recovery of the money deposited, it being found that there was no *benami* transaction as alleged: **Held**, that the rule that money paid under compulsion of a legal process was irrecoverable can only be pleaded where the party who has got the benefit of his opponent's payments, acts *bond fide*. **Marriott v. Hampton**, 7 T. R. 269, distinguished **Ward & Co. v. Wallis**, [1900] 1 Q. B. 675, followed. Clause (3) r. 46 of O. XXI of the Civil Procedure Code does not contemplate of cases where the deposit was purely conditional on

so conditionally deposited, without notice to the garnishee, even though made with the leave of the Court is a grave abuse of judicial process. It is true that O. XLVI does not expressly contemplate of an enquiry as is enjoined in O. V, rule 45 of the rules of the Supreme Court in England but the Court has inherent power to enquire. **HABIBATH CHOWDHURY v. HARADAS ACHARJYA CHOWDHURY** (1915) I. L. R. 43 Calc. ...

Digwari Tenure—Digwars of Ghat Bharra in district of Bankura—Appointments made by Government—Whether any relief thereto could

the plaintiff's appointment as Digwar

Digwari Tenure—contd.

in succession to his deceased father the last holder, but the commissioner cancelled it on a misreading of the law, as to his title, and on appeal to the Government the plaintiff was directed to go to the Civil Court for relief. Held, that the Digwars of Ghat Bharra in Bankura were the holders of an office remunerated by the enjoyment of land, and the history of the office established a general usage on the death of a Digwar holding office to appoint his heir in his place as the successor to his office. That here the usage of the heir taking his predecessor's place could be traced back to the seventeenth century and so long a usage could not be disregarded as an exponent of the Digwari right. On the contrary the force of law could safely be ascribed to it, subject to the qualification that the heir's claim and tenure of office was dependant on the approval of the Government. That the Civil Court could do no more than express its conclusion that the plaintiff was the heir of one of the last incumbents and his claim to succeed was subject to the approval of the Government, and that the ground on which the Commissioner cancelled the Magistrate's sanction was erroneous in law. *Jogendra Nath Singh v. Kalicharan Roy*, 9 C. W. N. 663, distinguished. That in view of all the circumstances of the case, a declaratory decree could be made defining the plaintiff's position, though it may be that it was not really necessary, for having regard to the Government's reply referring the plaintiff to the Civil Court, it would probably be prepared to give or withhold its approval in accordance with the view expressed by the Civil Court, seeing that it invited recourse thereto. That in view of the "as the" in the

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Digwari Tenure—contd.

plaint was not happily drafted. *Cockerell v. Dickens*, 2 Moo. I.A. 353, *Durg Prashad Surekha v. Bhagan Lal*, I. L. R. 31 Calc. 614; I. L. R. 31 I. A. 122, *Gopi Narayan Khanna v. Bansidhar*, I. L. R. 27 All. 325, I. L. R. 32 I. A. 123, referred to *HEMENDRA NATH ROY v. UPENDRA KARAIK ROY AND SECRETARY OF STATE FOR INDIA* (1915) I. L. R. 43 CALC. 743

Digwars, appointment of :—See **DIGWARI TENURE** 743

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Discretion :—See **FALSE INFORMATION** ... 173

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Dismissal of suit, application to set aside an order of :—See **APPEAL** 857

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Ex parte Decree—Decree without evidence—Practice and Procedure—Unliquidated damages—Undefended suit—defendant appearing at the trial—Leave to defend refused—Non denial of claim, effect of—Verification

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Ex parte Decree—contd.

Held, further, that there was no legal evidence on the record on which the decree made in favour of the plaintiffs might be supported; and that the plaintiffs were not entitled to succeed on the basis of an implied admission of their claim by the defendants *Per SANDERSON C. J.* The fundamental principle is that the plaintiff, when he comes to Court, must prove his case and must prove it to the satisfaction of the Court *Per WOODROFFE J.* No decree can be legally given in any cases without evidence except in cases of the suits governed by the provisions of O. XXXVII of the Civil Procedure Code. In this Court it has always been the practice in undefended cases to take evidence and defined in the Evidence Act, namely, oral statement of witness and documents proved before the Court. The *cursus curiae* may be looked at when interpreting the terms of the Civil Procedure Code *Galstaun v Hutchinson*, 1 L. R. 39 Calc. 79, referred to. *Per MOOKERJEE J.* Great caution should be exercised when suits are heard *ex parte*. This observation is of universal application. But it applies with special force to cases where unliquidated damages are claimed on the allegation that there has been a breach of contract. *Amritnath Jha v Dhunpat Singh*, 8 B. L. R. 44, referred to. *J. B. Ross & Co. v C. R. SCRIVEN* (1916) I. L. R. 43 Calc. 1001

Execution of Decrees: *See PRACTICE* ... 285

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Decree-holder—Payment of money by judgment-debtor by way of interest—Notification of the payment to Court—Certification of the payment—Civil Procedure Code (Act V of 1908) O. XXI r. — Limitation Act (XV of 1877), ss 19, 20. A decree holder who has received a certain sum of money by way of payment of interest, might either apply to certify payment

Execution of decree—concl.

before execution or might do so on his application for execution of the decree. On the 17th February, 1906, the plaintiff obtained a decree and on the 18th May, 1911, he applied for execution. At the time of the application he notified to the Court that he had received a certain sum on the 19th June, 1908, from the judgment-debtor, towards interests and alleged that the execution was not barred by limitation.—*Held*, that the notification to the Court of the receipt of the sum paid by the judgment-debtor was all that the decree-holder had to do in order to certify payment, and O XXI, r. 2 of the Code of Civil Procedure did not stand in the way. *EUSUFFZEMAN SARKAR v. SINCHIT LAL NAHATA* (1915) I. L. R. 43 Calc. ...

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Executrix, death of: See PROBATE ...

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Fact, questions of: See APPEAL ...

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False Information—Information to the police reported false—Subsequent petition to the Magistrate impugning the report and praying for trial—Complaint—Proper procedure—Reference of complaint to another Magistrate for enquiry and report, legality of—Power of latter to hold inquiry and direct prosecution of informant for offences under ss. 182 and 211 of the Penal Code—Jurisdiction of referring Magistrate to try such charges on the police report without previous disposal of the complaint—Discretion—Prejudice—Criminal Procedure Code (Act V of 1898), ss. 192, 200 to 203, 476, 537. A petition impugning the police

to a Sub-divisional Magistrate he should, therefore, either examine the complainant himself, record reasons for distrusting its truth, hold an inquiry personally, and then pass a formal order of dismissal, or he should make it

False Information—concl.

over to another Magistrate for disposal. The latter may then, after inquiry, make a proper order dismissing the complaint and pass an order under s. 476 of the Code. The Code does not permit a Magistrate to refer a complaint to another Magistrate for inquiry and report, and the latter has no jurisdiction in such a case to pass an order under s. 476. Where in such a case the police have reported the information as false, and have asked for a prosecution, the Magistrate has jurisdiction to try the charge on the police report. *Queen-Empress v. Sham Lall* I. L. R. 14 Calc. 707, referred to. There is no statutory provision requiring such petition to be finally disposed of as a complaint before a prosecution under s. 211 of the Penal Code commences. It is a matter of discretion, and the High Court will not, having regard to s. 537 of the Code, interfere with a conviction if the accused has not been prejudiced. *GANGADHAR PRADHAN v. EMPEROR* (1915) I. L. R. 43 Calc. 173

to Police: See SANCTION FOR PROSECUTION ... 1152**Female Heirs:** See HINDU LAW—STRIDHAN 64**Ferry:** See SPECIAL CONSTABLES ... 277**First Class Magistrate:** See PERIURY 542**Fitness:** See SURETY 1024

Forgery—Certified copy, filing of, whether use of forged document, if original be forged—Evidence of intention—Penal Code (Act XLV of 1860), ss. 466, 471. A series of similar transactions which are not the offence charged can only be used as evidence of the intention of the person who forged the document and not as evidence of forgery. It is extremely doubtful whether the mere filing of a copy is the use of a forged document. A certified copy thereof is certainly not a

Forgery—concl.

forged document. But it is otherwise where the offender used the copy knowing or having reason to believe that the entries in the original documents were forgeries and intending to use them for fraudulent purposes *Queen v. Nujum Ali*, 6 W. R Cr. 41, and *Emperor v. Mula Singh*, I L. R 28 All. 402, distinguished. *KRISHNA GOVINDA PAL v. EMPEROR*, (1915) I. L. R. 43 Calc.

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Siguring certificate of purchase of arms and ammunitions in false names and giving wrong addresses—Person legally entitled to possess the same—Act "fraudulent" if not "dishonest"—Penal Code (Act XLV 1860) ss 23, 24, 463 to 465
A person lawfully entitled to possess arms and ammunitions signing the prescribed certificate of purchase of the same in the name of another with an address not his own, and thereby deceiving the gunsmith and the Government and defeating the object of the certificate, commits forgery his act having been done "fraudulently," if not "dishonestly." *Reg. v. Toshack*, 1 Den C C R 492, *Empress v. Dhunum Kasee*, I. L. R. 9 Calc. 53, and *Queen-Empress v. Abbas Ali*, I. L. R. 25 Calc. 512, followed. *Cresley v. EMPEROR* (1915) I. L. R. 43 Calc.

Founder, descendant of: See *WAKF* ...

Fraud: See *FORGERY*

—: See *MISTAKE*

Fraudulent Preference—*State of mind of maker—Intention—Receiver—Onus—Provincial Insolvency Act (III of 1907), s. 57* The question whether there has been a fraudulent preference depends not upon the mere fact that there had been a preference but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor but that he has fraudulently done so. It depends upon what was in his mind.

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Fraudulent Preference—concl.

For this purpose it is not true that the debtor must be taken to have intended the natural consequences of his acts. One must find out what he really did intend. *Dicta of Lord Halsbury in Sharp v. Jackson*, [1899] A. C. 419, followed. It is not necessary to threaten criminal proceedings to constitute pressure. The threat of civil suits is enough. If it is established that the transaction was the result of real pressure brought to bear by a creditor on his debtor, it cannot be deemed as a spontaneous act. The onus is on the Receiver to show that it was an outcome of a fraudulent preference. *NARDEVRA NATH SINGH v. ASHUTOSH GUPTA*, (1915) I. L. R. 43 CALC.

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Fraudulent Suspension: See *SUBROGATION*

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Garnishee, deposit by: See *DEPOSIT IN COURT*

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Godowns: See *LAND ACQUISITION* ...

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Government, right of: See *ASSESSMENT* ...

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Great-grandfather's son's daughter's son: See *HINDU LAW—SUCCESSION* ...

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Guardian of Minor: See *ARBITRATION* ...

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High Court, jurisdiction of: See *PERVERIETY* ...

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General Rules and Circular Orders, Vol. I, Ch. XI, p. 45(e): See *VAKALAVANAM*

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Hindu Law—Alienation—Alienation by widow—Legal necessity—Spiritual welfare of her husband—To whom alienation permissible—Recital in a deed, by itself not conclusive evidence Where a d.e.d. by a limited owner with qualified power of alienation, is impeached, the test is whether the purpose for which the alienation was made was proper or legitimate. *Collector of Masulipatam v. Cavalry Venkata*, 8 Moo. I A. 529, referred to. Necessity is only one of the phases of the test of propriety. *Raj Lalhee v. Golok Chunder*, 13 Moo I A 209, *Sham Sunder Lal v. Achhanw*

Hindu Law—Alienation—contd.

Kumar, I. L. R. 21 All. 71; L. R. 25 I. A. 183, *Bejoy Gopal Mukerji v. Girindra Nath Mukerji*, I. L. R. 41 Calc. 793; referred to. The widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. An exhaustive enumeration of these religious or charitable purposes is neither possible nor necessary. *Cossinaut Bysack v. Hurrooondry Dossee*, 2 Morley's Digest 198, referred to. This being a question purely of Hindu law, great care must be taken in coming to a decision upon that subject in order to prevent English Judges being warped by impressions made upon their minds in consequence of their habitual application of English law and the nature of English decision to which they are accustomed and to consider in what way a Hindu Court of Justice would have decided the point. The true rule appears to be that there is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and that, within proper limits, the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit. *Malkoda v. Kulliani*, 1 Mac. Sel. Rep. 82 *Ram Chunder Surma v. Gangagorind*, 4 Mac. Sel. Rep. 147, *Kartick Chunder v. Gour Mohun*, 1 W. R. 48, *Ranjeet Ram v. Mahomed Waris*, 21 W. R. 49, *Ram Kacal Singh v. Ram Kishore Das*, I. L. R. 22 Calc. 506, *Churaman Sahu v. Gopi Sahu*, I. L. R. 37 Calc. 1, *Harmange v. Ram Gopal*, 17 C. W. N. 782, *Rama v. Ranga*, I. L. R. 8 Mad. 552, *Lakshminarayana v. Dasu*, I. L. R. 11 Mad. 288, *Vuppuluri v. Garimella*, I. L. R. 34 Mad. 288, *Puran*

Hindu Law—Alienation—contd.

Dai v. Jai Narain, I. L. R. 1 All. 482, *Kupur v. Sebak Ram*, 1 Bor. 405, *Jogjibari v. Deoshankar*, 1 Bor. 394, *Chunilala v. Jusso*, 1 Bor 55, referred to. A gift of a moderate portion of the property of her husband by the widow with a view to his spiritual benefit is valid. Whether the alienation covers a reasonable portion of the property of the husband of the lady is a question which must be determined with reference to the circumstances of each particular disposition. *Ram Chunder Surma v. Gangagorind*, 4 Mac. Sel. Rep. 147, *Churaman v. Gopi Sahu*, I. L. R. 37 Calc. 1, referred to. Recitals in a deed are not by themselves conclusive evidence of their truth and the facts alleged should be proved alhunde. *Brij Lal v. Inda Kunwar*, I. L. R. 36 All. 187, referred to. *KRUB LAL SINGH v. AJODHIA MISER* (1915) I. L. R. 43 Calc.

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Hindu Law—Alienation by Widow—Legal necessity—Onus of proof of legal necessity as affected by lapse of time—Proof of custom of succession to estate—Limitation—Adverse possession—Res judicata On this

in I. L. R. 38 Calc at page 725, *RAVANSHWAR PRASAD SINGH v. CHANDI PRASAD SINGH* (1915), I. L. R. 43 Calc.

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Hindu Law—Endowment—Nature object, custom and practice of muth or asthal—Right of succession as Mahant, custom of—Mahant appointing a married man and father of children to be Mahant—Abdication by Mahant of his functions—Right of his senior chela to succeed him. In this appeal the question was whether the appellant who claimed to be senior chela of the first respondent, the late mahant who had retired, or the second respondent

Hindu Law—Endowment—contd.

who claimed to have been appointed by him, was entitled to succeed him as the *mahant* of the Patepur *asthal* or *muth*. On this question their

dent was a married man who had not on initiation renounced his worldly ties and the begetting of children, and was not an ascetic or *bairagi chela*, but was disqualified from holding the office of *mahant*. As to the nature, object, custom and practice of such a religious institution, *Sammantha Pandara v. Sellapa Chetti*, I. L. R. 2 Mad. 175, was referred to. The question as to who had the right to succeed to the office of *mahant* depended, according to the well-known rule in India, not on the general customary law, but upon the custom of the particular *asthal*.

I. A. 405, *Muttu Ramalinga Setupati v. Perianayagam Pillai*, I. L. R. 1 I. A. 209, and *Raja Vurmah Valia v. Rani Vurmah Kunhi Kutta* I. L. R. 1 Mad 235; I. L. R. 4 I. A. 76, referred to. On the question as to the second respondent being a married man, on which the Courts below had differed, their Lordships were of opinion that, the verdict given by the Subordinate Judge who had the advantage of seeing and hearing the witnesses, could not be lightly set aside, especially as that Judge was also presumably acquainted with the manners and customs of the people among whom such a transaction was alleged to have occurred. There were, moreover, no sufficient grounds stated by the High Court for disturbing that verdict. Having themselves investigated the facts, their Lordships held that the rule—of attach-

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Hindu Law—Endowment—concl'd.

ing weight to the opinion of the Judge of first instance—could not safely be departed from in the present case. Though the deeds appointing the second and third respondents to be successively *mahants* were ineffective, the former being not competent to hold the office, and the latter having died, the first respondent could not, in their Lordships' opinion, be considered to be still the *mahant*. He had abdicated all his functions, and had himself retired from the office. A *mahant* was not only a spiritual preceptor, but a trustee in respect of the *asthal*. He had by appointing a married man and father of children to the office consented to a violation of those vows of asceticism and celibacy which it was his duty as a trustee to maintain and protect. His abdication must therefore be accepted as a fact in the case. A vacancy in the office had therefore been created which under the circumstances would devolve upon the appellant who was found to be senior *chela* and was not alleged to be incompetent to be *mahant*. RAM PRAKASH DAS & ANAND DAS (1916), I. L. R. 43 CALC.

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Hindu Law—Joint family—Mitakshara law—Allegation of separation by one member of joint family—Expression of intention to hold share separately followed by suit for partition—Unequivocal and clearly expressed intention—"Separation" as distinct from "division of shares of property." In this case their Lordships of the Judicial Committee held, on the facts, that the conduct of the plaintiff, a member of a joint Hindu family governed by the Mitakshara law, in indicating by a notice in a registered letter his intention to separate himself and enjoy his share in severality, coupled with a suit for partition was as "unequivocal" and "clearly expressed" an intention as could be

Hindu Law—Joint family—contd.

made, and that it amounted to a separation with all its legal consequences. The rule of law applicable to cases of separation from the joint undivided family laid down in *Suraj Narain v. Iqbal Narain*, I. L. R. 35 All. 80; L. R. 40 I. A. 40, followed. Nowhere in the Mitakshara is it stated that agreement between all the coparceners is essential to the disruption of the joint status, or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. On the other hand, numerous authorities on the subject leave no room for doubt that "separation," which means the severance of the status of jointness, is a matter of individual volition. Separation from the joint family involving the severance of the joint status so far as the separating member is concerned with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy the hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share, which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable: neither the co-sharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient, this

Hindu Law—Joint family—concl.

Court has simply to give effect to his right to have his share allocated separately from the others. *Matho Parshad v. Mehrban Singh*; I. L. R. 18 Calc. 157; L. R. 17 I. A. 194, *Deo Bunes Koer v. Deekaranath*, 10 W. R. 273, *Appoier v. Rama Subba Aiyar*, 11 Moo. I. A. 75, *Joy Narayan Giriraj v. Girish Chunder Mitra*, I. L. R. 4 Calc. 434; L. R. 5 I. A. 223, and *Vato Koer v. Rowshun Singh*, 8 W. R. 82, referred to. *GIRIJA Bai v. SADASIV DHUNDIRAJ* (1916), I. L. R. 43 Calc. ... 1031

Hindu Law—Partition—Mitakshara—Joint Family—Karta—Form of account to be directed against the karta on a partition. In an ordinary suit for partition of joint family property, in the absence of fraud or other improper conduct, the only account the *Karta* is liable for is as to the existing state of the property divisible, and the enquiry directed by the Court must be in the manner usually adopted to discover what in fact the property now consists of. *Chackun Lall Singh v. Pooran Chunder Singh*, 9 W. R. 483, *Konerray v. Gurrao*, I. L. R. 5 Bom. 589, *Raja Setrucherla Ramabhadra v. Raja Setrucherla Virabhadra Nyanarayana*, I. L. R. 22 Mad. 470; L. R. 26 I. A. 167, *Narayan bin Babaji v. Nathaji Durgaji Marwadi*, I. L. R. 28 Bom. 201, *Balakrishna Iyer v. Muthusami Iyer*, I. L. R. 32 Mad. 271, and *Shookmoy Chandra Das v. Monoharrji Dassi*, I. L. R. 11 Calc. 684; L. R. 12 I. A. 103, referred to. *Obhoy Chundra Roy Chordhry v. Pearcey Mohun Gooho*, 13 W. R (F. B.) 75; 5 B. L. R. 347, and *Damolardas Maneklal v. Uttamram Maneklal*, I. L. R. 17 Bom. 271, explained. *PARMESHWAR DEBE v. GOBIND DEBE* (1915) I. L. R. 43 Calc. 459

—Right to partition—Partition between co-heirs—Reversionary interest—Administrat-

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*tor's power to transfer property—Permanent leases—Probate and Administration Act (V of 1891) s. 90. Where plaintiffs in a suit for partition were in joint possession of certain property with the defendants as co-sharers under leases which purported to be permanent leases granted to them under an arrangement sanctioned by the Court, and where the only person at the time of the suit interested in challenging the plaintiff's right was a party to the suit and did not contest the suit :—*Held*, that the plaintiffs were entitled to partition and the fact that the partition would have to be set aside if the reversioner on coming into possession of the property succeeded in a suit for setting aside the leases, was not sufficient ground for refusing the plaintiffs the right to partition. *Sundar v. Parbati*, I. L. R. 12 All. 51; L. R. 161 A 186, and *Bhagat Sahai v. Bipin Behari Mitter*, I. L. R. 37 Calc 918, L. R. 37. I. A 198, followed. *SAJIMULLAH v. PROBhat CHANDRA SEN* [1916], I. L. R. 43 Calc.*

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Hindu Law—Stridhan—Inheritance—
Female heirs Stridhan inherited by female heirs does not become the latter's stridhan. The female heirs take only a Hindu woman's estate in the property. *Sheo Shankar Lal v. Debi Sahai*, I. L. R. 25 All. 468, L. R. 30 I. A. 202, *Prankissen Laha v. Noyamoney Dasree*, I. L. R. 5 Calc. 222 and *Huri Doma' Singh Sarmane v. Krish Chunder Mukerjee*, I. L. R. 17 Calc. 911, referred to. *JOGENDRA CHANDRA BANERJEE v. PHANI BAESAN MOOKERJEE* (1915) 1 L. R. 43 Calc.

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—*Mitakshara succession—Adoption—Rights of adopted son—Competition between adopted son and natural son of co-wives—Sapindas—Co-wife's natural son, if "son"—Terla, construction of Mitakshara, Ch II, s XI, paras. 9,*

Hindu Law—Stridhan—concl'd.

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11, 25—"Without issue" meaning of—*Manu, Ch. IX, verse 183—Yajnavalkya Ch. II, verses 117, 145*. S, a Hindu governed by the Mitakshara school of Hindu Law, married four wives in succession. In conjunction with his first wife, by whom he had no issue, he adopted a son H. By his second wife, S had a son G born to him. S pre-deceased his fourth wife M, having had no issue by her. M died intestate. On a suit brought by H :—*Held*, that both H and G were entitled to succeed to M's stridhan property as *sapindas* of S, and in the absence of any express text curtailing the rights of the adopted son in the circumstances of the present case, H was entitled to share equally with G on the general principle that the adopted son occupies the same position as a natural son and his rights are in every respect similar to those of a natural son. *Joylisor Choudhury v. Panchoo Baboo*, 4 C. L. R. 312, *Padmalumari Debi v. Court of Wards*, I. L. R. 8 Calc. 500, L. R. 8 I. A. 229, followed. *Nagindas Bhogramdas v. Bachoo Hurkissen-das*, I. L. R. 40 Bom. 270, referred to. The expression "without issue" in Mitakshara, Ch. II, section XI, para 9, must be construed in its ordinary sense, and M must be deemed to have died "without issue." *Quare*—Whether *Manu, Ch. IX, verse 183* has any reference to questions of inheritance. *Annapurni Nachiar v. Forbes*, I. L. R. 23 Mad 1, *Bhimacharya v. Ramacharya*, I. L. R. 33 Bom. 452, referred to. *Per MOOKERJEE J. A.* special text forming an exception to a general text should be construed strictly and applied only to cases falling clearly within it. *Gangu v. Chandrabhagabai*, I. L. R. 32 Bom. 275, and *Anandi v. Hira Suba*, I. L. R. 33 Bom. 404, referred to. *GANGADHAR BOOGIA v. HIRA LAL BOOGIA* (1916) I. L. R. 43 Calc.

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Hindu Law—Succession—Dayabhaga School—Whether great-grandfather's son's daughter's son or maternal uncle preferential heir—Sure decisus. In a Dayabhaga family the great-grandfather's son's daughter's son is entitled to succeed as heir in preference to the maternal uncle. *Kai'ash Chandra Adhikari v. Karuna Nath Chowdhry*, 18 C. W. N. 477, followed. The principle of spiritual benefit regarding the succession in a Dayabhaga family laid down by the Full Bench in *Goroo Gohain Shaha's Case*, 13 W. R. (F. B.) 49; 5 B. L. R. 15, cannot be questioned now. *KEDAR NATH BAVERJEE v. HARI DAS GHOSE* (1915) I. L. R. 43 Calc. ...

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Hindu Law—Will—Construction of will—Contingent bequest in futuro of whole estate—Succession Act (X of 1865). ss. 107, 111—Event on occurrence of which distribution was to take place, specified in will.—The will of Hindu resident in Calcutta and subject to the Dayabhaga School of law, who died on 10th November 1907, stated, "I appoint my wife Pritoshuni Dasi to be the sole executrix of this my will. I hereby authorise my said wife to adopt *dattaka putra*. In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son, or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Benodini Dasi who may be living at the time of my death." Two sons of his sister were living at the death of the testator. On his death his widow as executrix duly obtained probate of the will; and in August 1909, in pursuance of the authority given her by her deceased husband, she adopted a son who, however, died on 10th March 1910, an infant unmarried and leaving no male issue; and a few days afterwards the

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widow herself died. In a suit by the adoptive mother of the testator, now represented by the appellants, against the two sons (the present respondents) of his sister, for a declaration that in the events that had happened the devise to them had failed, and that the testator's estate had devolved on her. Held, on the construction of the will (affirming the decisions of the Courts in India), that on the death of the testator the widow took an interest in the estate which by virtue of the probate was not divested on her adoption of a son to her husband, and on her death the executory bequest to the sons of the testator's sister took effect and the estate passed to them. Section 111 of the Succession Act (X of 1865) was not applicable because the event on the occurrence of which the distribution was to take place was distinctly mentioned as, in the words of the will, "the death of my wife," and the gift to the testator's nephews was therefore not affected by that section. *BHUPENDRA KRISHNA GHOSE v. AMARENDRA NATH DEY*, (1915) I. L. R. 43 Calc. ...

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Absolute sale—Unregistered purchaser of portion of patni tenure, interest of, whether an incumbrance—Bengal Tenancy Act (VIII of 1885), ss. 161, 167—Civil Procedure Code (Act V of 1908) s. 98 Per Jenkins C.J. and N. R. Chatterjee J. (Mullick J. dissenting) The interest of an unregistered purchaser of a portion of a patni tenure is not an "incumbrance" within the meaning of s.

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161 of the Bengal Tenancy Act. <i>Chandra Sakai v. Kalli Prosanno Chaklerbutty</i> , I. L. R. 23 Calc. 254, distinguished. A purchaser of a tenure at a sale held in execution of a rent decree is not therefore required to annul such an interest (<i>i.e.</i> , of an unregistered purchaser of a portion of a patni) under the provisions of s. 167 in order to get a clear title. <i>ABDUL RAHMAN CHOWDHURI v. AHMADAR RAHMAN</i> (1915) I. L. R. 43 Calc. ... 558	
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Security for Costs—Appeal—Jurisdiction—Presidency Towns Insolvency Act (III of 1909) s. 8 (2) (b)—Civil Procedure Code (Act V of 1908) ss. 117, 151 and O. XLI, r. 10—Practice. On an application to the Court of Appeal for security for costs in an appeal from an order of a Judge in insolvency — Held, that the Court has jurisdiction to entertain the application under s. 117 and O. XLI, r. 10 of the Code of Civil Procedure, read with s. 8 (2) (b) of the Presidency Towns Insolvency Act. <i>Sesha Ayyar v. Nagarathna Lata</i> , I. L. R. 27 Mad. 121, not followed. <i>LAKSHIPRIYA DASI v. RAJKISHORI DASI</i> (1915) I. L. R. 43 Calc. ... 243	
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	Power of Court to grant relief, where interest unconscionable— <i>Creditor</i> , when his improper act or omission delays payment of debt. Where delay in the payment of the principal debt is caused by some improper act or omission of the creditors, the accrual of interest will be suspended during such period as the debtor is so prevented. <i>Edwards v. Warden</i> , 1 App. Cas. 281, <i>Merry v. Ryers</i> , 1, Eden, 1, <i>Marlborough v. Strong</i> , 4 Brown P. C. 539, <i>Cameron v. Smith</i> , 2 B. & Ald. 305, <i>Bann v. Dalziel</i> , Moo. & M. 228, <i>Anderton v. Arrowsmith</i> , 2 P. & D. 408, <i>Laing v. Stone</i> , 2 Man. & Ry. 561; <i>Mon & M.</i> 229, <i>London, Chatham and Dover Railway Company v. South-Eastern Railway</i> , [1891] 1 Ch. 120, and <i>Webster v. British Empire Mutual Life Assurance Co.</i> , 16 Ch. D. 169, referred to. A Court is competent to grant relief where the rate of interest appears to the Court to be of a penal character, that is, so unconscionable and extravagant that no Court should allow it. <i>Khagaram Das v. Ramsankar Das</i> , I. L. R. 42 Calc. 652, <i>Abdul Majeed v. Khatrude Chandra Pal</i> , I. L. R. 42 Calc. 690, <i>Bouicang v. Banga Behari Sen</i> , 22 C. L. J. 311, 20 C. W. N. 408, referred to. <i>Gopeshwar Saha v. Jadav Chandra Chanda</i> (1915) I. L. R. 43 Calc. 632
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Act). Under that Order there are only two methods of discovery, one by interrogatories and the other by an order directing discovery of documents in the possession or power of the other side. An affidavit of assets actually received can, therefore, be obtained in probate proceedings by interrogatories only. Under rule 2 of Order XI, in India as in England, the Judge has not any power to settle interrogatories, but he can only decide what should be administered. The *dicta* in English cases with regard to the more extensive powers of Courts in matters of probate, seem to imply that the strictest relevancy may not be required in interrogatories therein. *ANILBALA DASI v. RAJENDRANATH DALAL* (1915) I. L. R. 43 Calc. ...

Investigation : See VALUATION OF SCIT**Istemrari Mokarari : See LEASE** ...**Jail Register, extract from : See SECURITY FOR GOOD BEHAVIOR** ...**Jajnavalkya, Ch. II, Vers. 117, 145 : See HINDU LAW—STRIDHAN** ...**Joinder of Cases—Offences against different persons by the same accused—Legality of joint trial—Criminal Procedure Code (Act V of 1898) s. 234—Practice.** Section 234 of the Criminal Procedure Code is not limited to the case of offences com-

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different complainants. *SUBEDAR AUNI v. EMPEROR* (1915) I. L. R. 43 Calc. 13

Joint Estate—Private partition—Encumbrance by co-sharer—Holding in severalty—Tenancy in common—Partition by Collector, effect of—

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ment of plaintiff's case and adoption by him of defendant's. Section 99 of Beng. Act V of 1897 applies only where the lands are held jointly by the proprietors and not in severalty in pursuance of a private arrangement between the parties.

Hridoy Nath v. Mohobutnessa, I. L. R. 20 Calc., 285, *Aimanaddi Patrav. Nabin Chandra Gope*, 11 C. L. J. 95, *Syed Abdul Lalif v. Amanaddi Patrav*, 15 C. W. N. 426, followed. *Joy Sankari Gupta v. Bharat Chandra Bardhan*, I. L. R. 26 Calc. 434, distinguished. Where a section of an Act (here s. 128 of Beng. Act VIII of 1876) which has received a judicial construction [*Hridoy Nath v. Mohobutnessa*] is re-enacted in the same words, such re-enactment [here s. 99 of Beng. Act V of 1897] must be treated as a legislative recognition of that construction: *Mansell v. Regina*, 8 E. & B. 54, *Ex parte Campbell*, I. L. R. 5 Ch. App. 703, followed. When on a partition by the Collector, any land of an undivided joint estate, which had been encumbered by any co-share, is allotted to another co-sharer, the latter takes it free from the encumbrance so created. *Byjnath v. Ramoodeen*, I. L. R. 1 I. A. 106, followed. The decision in *Sheikh Ahmedoolah v. Sheikh Ashraf Hossein*, 13 W. R. 447, [where the lands were held in severalty] which was followed in *Hridoy Nath v. Mohobutnessa*, I. L. R. 20 Calc. 285, is not, as is assumed in *Joy Sankari Gupta v. Bharat Chandra Bardhan*, I. L. R. 26 Calc. 434,

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inconsistent with, and has not consequently been overruled in effect by the decision of the Judicial Committee in *Byjnath v. Ramoodeen*, L. R. 1 I. A. 106 [where the lands were held in common tenancy], *Byjnath v. Ramoodeen*, L. R. 1 I. A. 106, *Venkatarama v. Esuma*, I. L. R. 33 Mad 429, *Sheikh Nura v. Baikunthanath Roy*, 21 C. L. J. 596, *Brojo Nath Saha v. Dinesh Chandra Neogi*, 21 C. L. J. 599, *Tarkanta v. Ishur Chandra*, 21 C. L. J. 603, *Joy Sankari Gupta v. Bharat Chandra Bardhan*, 1 L. R. 26 Calc. 434, distinguished as cases where land was held in common tenancy. A plaintiff cannot be allowed to abandon his own case, adopt that of the defendant and claim relief on that footing. *Shubristo Sircar v. Abdul Itakeem*, I. L. R. 5 Calc 602, *Ramroyal v. Junmenjoy*, I. L. R. 14 Calc. 791, *Balmukund Kesurdas v. Bhagwandas Kesurdas*, 15 Bom. L. R. 209, followed. But that does not prevent the defendant from contending that even on the facts found the plaintiff's claim [here for ejectment] cannot be sustained. *NAGENDRA MOHAN ROY v. PYARI MOHAN SAHA*, (1915) I L. R. 43 Calc.

Joint Family: See HINDU LAW—PARTITION

Joint Immoveable Property, partition of: See BENAMIDAR

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——— *Chota Nagpur Tenancy Act (Beng. VI of 1905)* ss. 87, 258, 264 —Revenue Officer—Judicial Commissioner—Government's power to appoint the officer to hear appeals.—Section 87 of the Chota Nagpur Tenancy Act provides for a suit before a Revenue Officer and for an appeal in the prescribed manner to the prescribed officer from decisions passed under sub-section (f) that is a decision on any other matter not referred to in clauses (a) to (e). The rules made by the Government provide that suits under section 87 of the Act shall be tried in all respects as suits between the parties. Section 264 (viii) of the Act gives the Government power to prescribe the officer to hear appeals, and the Judicial Commissioner is the prescribed officer under the rules. The provisions for appeal appear to have been overlooked in section 258 and it must, therefore, be understood that the special Appellate Court in Revenue Cases, in deciding a dispute under this Act, performs the functions of a Revenue Officer. *GANESH NARAIN SAHI DEO v. PROTAP UDAI NATH SAHI DEO* (1915) I L. R. 43 Calc. ... 136
——— *Court of limited pecuniary jurisdiction—Mesne profits amounting to Rs. 60,000, antecedent to suit and pendentite, whether can be investigated by Munsif—Civil Procedure Code (Act XIV of 1882), ss. 50, 211, 212—Civil Courts Act (XII of 1887), ss. 7, et. seq. (1), 18* When a plaintiff institutes his suit for possession and mesne profits antecedent to the suit in a Court of limited pecuniary jurisdiction, he may be rightly deemed to have limited his claim to the maximum

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amount for which that Court can entertain a suit. In fact in such a case if the plaintiff subsequently put forward a claim in excess of the jurisdiction of the Court, he may be justly required to remit the excess because he had with his eyes open brought his suit deliberately in a Court of limited pecuniary jurisdiction. *Golap Singh v. Indra Kumar Herra*, 13 C. W. N. 493; 9 C. L. J. 367, followed. *Suklaishan Dass v. Rampershad*, 7 All. L. J. R. 963, dissented from. But meane profits antecedent to the suit and meane profits *pendente lite* stand on very different grounds. A Munsif cannot entertain an application for investigation of meane profits *pendente lite* when the claim was laid over Rs. 60,000. The proper course to follow was to direct the return of the plaint in so far as it embodied a prayer for assessment of meane profits from the institution of the suit to the date of delivery of possession for presentation to the Court of competent pecuniary jurisdiction, i.e., the Court of the Subordinate Judge. *Rameswar Mahlon v. Dilu Mahlon*, I. L. R. 21 Calc. 550, distinguished. *BHUPENDRA KUMAR CHAKRABARTY v. PURVA CHANDRA BOSE*, (1910) I. L. R. 43 Calc. ... 650

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Land Acquisition—Godowns used as servants' residence whether part of house or building—Acquisition of such godown alone, legality of—Land Acquisition Act (I of 1951), ss. 49 (1) & 51—Practice—Appeal. Godowns necessary as residence

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for servants are part and parcel of a building [within the meaning of s. 49 (1) of Land Acquisition Act]

godowns would thus be an acquisition of a part of a house contrary to the provisions of the Act. It has never been doubted that an appeal would lie in the case of such an order under that section. *Hasun Molla v. Tasiruddin*, I. L. R. 39 Calc. 393, distinguished. *DAL-CHAND SINGH v. SECRETARY OF STATE FOR INDIA* (1916) I. L. R. 43 Calc. ... 665

Land Acquisition Act (I of 1894), ss. 49 (1), 54: See LAND ACQUISITION ... 665

s. 53 .

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Landlord and Tenant—Non-transferable occupancy holding—Occupancy holder transferring part of his holding without the knowledge or consent of the landlord—Transfer, validity of—Non-payment of rent by tenant—Disclaimer—Suit by landlord for khas possession of the transferred portion. The holder of a non-transferable occupancy holding has no power to create by transfer a title good against his landlord. Where a tenant transferred by a deed of sale a portion of his non-transferable occupancy holding without his landlord's knowledge or consent and subsequently refused to pay the rent of the transferred portion to the landlords on the ground that it was sold and relinquished in favour of the purchaser, paying rent only for the portion of the holding which remained in his possession, and where such apportionment of the rent was accepted by the landlords: Held, that such an act on the part of the tenant amounted to a disclaimer to all right, title and interest to the transferred part, and that the part

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transferred was at the disposal of the landlords, unless any third person could make out a good title to possession as against them. **KUJJA KISHORE PAL CHOWDHURY v. BABA SUNDABHAI DASSE** (1915) I. L. R. 43 Calc. 878

Purchase of raiyats' interest by sole Landlord—Occupancy holding and occupancy right—Transferability—Merger—Under-raiyat—Notice to quit—Ejectment—Bengal Tenancy Act (VIII of 1885) as amended by Bengal Act I of 1907, s. 22, cl. (2) 49, 85 and 167. The raiyats of certain lands in dispute executed a mortgage of their lands and put the mortgagee in possession. Subsequently the mortgagee settled the lands with under-raiyats. The superior landlord then brought a suit for rent against his raiyats and purchased the holding at a sale for arrears of rent. Thereafter, the landlord sold the permanent raiyats to one Meajan, who, after having taken a lease from the landlord and after having redeemed the mortgage, sold the same to the present plaintiffs. The plaintiffs, thereupon, brought a suit to eject the under-raiyats. Held, that the occupancy still continued to exist after the purchase by the landlord. **Akhil Chandra Biswas v. Hasan Ali Sadagar**, 19 C. W. N 246, followed. Held, also, that the landlord was able to transfer the holding to Meajan, through whom it came to the plaintiffs. Held, also, that the under-raiyats continued to be under-raiyats and were duly served with notice to quit and must be ejected. **YAKUB ALI v. MEAJAN** (1915) I. L. R. 43 Calc. 164

lawful apprehension, resistance to:
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Lease—“Istemrari mokarari,” meaning of the expression, lexicographical and customary—Tenure, perpetuity

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of—What covenants and circumstances favour the theory of perpetuity—Meaning of words in a document, whether a question of fact or law—Rights of parties to a contract how governed. The expression “*istemrari mokarari*” does not necessarily convey, either lexicographically or by way of custom, an estate of inheritance; but an *istemrari mokarari patta*, notwithstanding the absence of words indicative of heritability, such as *ba farzandan*, *naslan bad naslan* or *al-aulad*, may indicate a perpetual grant, if the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties, show such an intention with sufficient certainty. Clauses in a lease which impose a restraint on transfer or cutting down of fruit-bearing or income-yielding trees by the lessee are not consistent with the theory of a perpetual lease. Clauses which throw the cost of improvement on the lessee indicate some measure of continuity, but not necessarily perpetuity. A lease in favour of two persons points to the conclusion that, though some measure of continuity was desired, perpetuity was not intended. A substantial premium for a lease is one of the surest indications of permanent grant. **Tulshi Pershad Singh v. Ramnarain Singh**, I. L. R. 12 Calc. 117; **L. R. 12 I. A. 205**, analysed and followed **Tulshinraim Sahu v. Baboo Modnarain Singh**, (1848) S. D. A. 752, 10 I. D. (O S) 532, **Ameeroonissa Begum v. Helinarain Singh**, (1853) S. D. A. 648. The Government of Bengal v. Nawab Jafur Hossein, 5 Moo I. A. 467, **Sarobur Singh v. Raja Mahender-narain Singh**, (1860) S. D. A. 577, **Raja Lilanand Singh Bahadur v. Thakur Munoranjun Singh**, 13 B. L. R. 124, **L. R. Sup. vol. 181**, **Sheo Pershal Singh v. Kally Das Singh**, I. L. R. 5 Calc. 543.

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Bilasmoni Dasi v. Raja Shepersad Singh, I. L. R. 8 Calc. 664; I. L. R. 9 I. A. 33, *Beni Pershad Koeri v. Dudhnath Roy*, I. L. R. 27 Calc. 156; I. L. R. 26 I. A. 216, *Agm Bund Upadhyo v. Mohan Bikram Shah*, I. L. R. 30 Calc. 20, *Narsingh Dyal Sahu v. Ram Narain Singh*, I. L. R. 20 Cal. 999, *Chota Nagpur Banking Association (1915)* I. L. R. 43 Calc. ...

Rajah Lelanund Singh, 3 W. R. 84, *Telait Manoraj Sing v. Raja Lalanand Sing*, 2 B. L. R. A. C. 125n, *Rajah Lelanund Singh v. Thakoor Monorunjun Singh*, 5 W. R. 101, *Lakhu Koncar v. Ray Hari Krishna Singh*, 3 B. L. R. A. C. 226; 12 W. R. 3, and *Karunakar* ...

meaning of words in a document is a question of fact, though the effect of words is a question of law. *Chatenay v. Brazilian Submarine Telegraph Company*, [1891] 1 Q. B. 79, followed. The rights of parties to a contract are to be judged by that law by which they may justly be presumed to have bound themselves. *Lloyd v. Guibert*, 6 B. & S. 100, 122 E. R. 1134, and *Abdul Aziz Khan v. Aprayasari Nataker*, I. L. R. 27 Mad. 131; I. L. R. 31 I. A. 1, followed. Where a lease is in favour of two persons and the lease would not terminate till the death of the survivor of the two lessees, no question of limitation can arise before the death of both the lessees. *Quere*: Whether the mode in which registration of a lease is effected is relevant to an enquiry as to the nature of the lease. *Najibulla Mulla v. Nasir Mistry*, I. L. R. 7 Calc. 196, *Jagatdhar Narain Prasad v. Brown*, I. L. R. 33 Calc. 1133, and *Inda Bibi v. Jain Sirdar Ahiri*, I. L. R. 35 Calc. 845, *Sartaj* ...

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Kuari v. Deoraj Kuari, I. L. R. 10 All. 272; I. L. R. 15 I. A. 51, referred to *Ram Narain Singh v. Chota Nagpur Banking Association (1915)* I. L. R. 43 Calc. ...

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Letters Patent Appeal—True result of cancelling therein of a judgment of reversal of a single Judge of the High Court—Leave to appeal to Privy Council—Letters Patent, 1865, cl. 15, 36, 39—Civil Procedure Code (Act V of 1908), ss. 110, 115—“Court immediately below.” In an appeal under clause 15 of the Letters Patent (or Charter) the cancelling of a judgment of reversal passed by a single Judge of the High Court results in an affirmation of the decision of “the Court immediately below.” Such a Judge sitting alone is not a Court subordinate to the High Court; and thus the decision of a single Judge can be revised under s. 115 of the new Code. *DEBENDRA NATH DAS* & *BIRDHENDRA MANSINGH (1915)* I. L. R. 43 Calc. ...

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Limitation—Court of Wards, competency of, to acknowledge debt—Effect of acknowledgment of pre-existing debt by the Court as regards limitation—Court of Wards Act (Being JX of 1879), s. 18—Limitation Act (IX of 1908) s. 19. The Court of Wards Act 1879, does not contain any express power authorizing the Court to execute promissory notes. But there can be no doubt on the authorities that the Court has power to give an acknowledgment so as to give a new period of limitation under s. 19 of the Limitation Act. *Beti Maharoni v. Collector of Etawah*, I. L. R. 17 All 198, *Ram Charan Das v. Gaya Prasad*, I. L. R. 30 All. 422, and *Kondamodalu Linga Reddi v. Alluri Sartarayudu*, I. L. R. 34 Mad. 221, applied. **RASHBEHARY LAL MANDAR v. ANAND RAM** (1915) I. L. R. 43 Calc. ...

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Limitation Act (XV of 1871) s. 14—Suspension of cause of action In this appeal their Lordships of the Judicial Committee affirmed, on the question of limitation, the decision of the High Court in the case of *Lakhan Chandra Sen v. Madhusudan Sen* which is reported in I. L. R. 35 Calc 209. **NRITYAMONI DASSI v. LAKHAN CHANDRA SEN** (1916), I. L. R. 43 Calc. ...

Valuable Consideration, what is—“Transfer,” if grant of permanent lease is—Suit to recover possession of property from lessee, if maintainable without making mortgagee of same property party—Limitation Act (XV of 1877) s. 10, Sch. II Art. 134, and (IX of 1905) ss. 10, 30, Sch. I, Art. 134. In a suit by a shebaat to recover possession of debutter property vested in the shebaat in trust for the deity, which had been transferred more than 12 years before the institution of the suit by the plaintiff's predecessor in title, who had granted a *putna* lease of the property for consideration of a considerable fixed annual rent, but without receipt of

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any bonus— <i>Held</i> , that the suit was barred by limitation under Art. 134 of Sch. I of Act IX of 1908. <i>Abhiram Goswami v. Shyama Charan Nandi</i> , I. L. R. 36 Calc. 1003, I. L. R. 36 I. A. 148, <i>Ishwar Shyam Chind Jiu v. Ram Kanas Ghose</i> , I. L. R. 38 Calc. 526 : I. L. R. 38 I. A. 76, and <i>Damodar Das v. Lakhman Das</i> I. L. R. 37 Calc. 885 ; I. L. R. 37 I. A. 147, distinguished. <i>Held</i> , further, that the grant of the permanent lease in this case was a transfer for valuable consideration. <i>Currie v. Misa</i> , I. L. R. 10 Exch. 153, followed. <i>Held</i> , also, that no period of limitation was prescribed for a suit of the present nature under the Act of 1877, and therefore s. 30 of the Act of 1908 has no application in this case. Where in this case, the plaintiff had granted a valid usfructuary mortgage of the property in suit to a third person for a term which did not expire before the institution of the suit, it is not open to him to determine the lease to the defendants, the benefit of which had been expressly assigned by the plaintiff to the mortgagee. RAMESWAR MALIA v. SRI SRI JIU THAKUR (1915) I. L. R. 43 Calc. ...	34
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Liquidator—Registered company—Property of the company, vesting of—Official Assignee—Distribution of proceeds in Court, when governed by Civil Procedure Code (Act V of 1908)—Release—Companies Act—(VII of 1913) ss. 2 (3), 3 (3), 171, 215, 232. The liquidator of a registered company differs in this respect from the Official Assignee in that the property of the Company does not vest in him. The distribution of the proceeds which had come into Court before an application was made (to the High Court) to pass an order in favour of the liquidator, must be governed by the provisions of the Code of Civil Procedure. AMRITA LAL KUNDU v. ANUKUL CHANDRA DAS (1915), I. L. R. 43 Calc. ...	586
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Mahomedan Law Endowment—Public Mosque—Right of management—Civil Procedure Code, 1882, s. 539—Suit for appointment of Trustees and for settlement of a scheme of management—Community composed of Sunni Mahomedans from various districts and places—Trust deed giving management exclusively to Rhanderias—Discretion of Kazi under Mahomedan Law—Discretion of Court—Obligation to adhere to intentions of founder, and objects of Trust—Right to vary details of management in accordance with changing conditions and circumstances. This appeal which arose out of a suit brought under section 539 of the Civil Procedure Code, 1882, for the appointment of trustees, and the settlement of a scheme of management related to	the Sunni Jumna Musjid at Rangoon which was admittedly a public mosque dedicated to the performance of religious worship by all Sunni Mahomedans without restriction as to place of origin. The land on which the mosque was built had been granted by the Government on trust for that purpose in 1862 and it was, together with other land adjoining, purchased in 1871 from the Government by five members of the Sunni Mahomedan community who by a deed of trust in March 1872 dedicated it, and the mosque erected thereon, for the purpose of divine worship by all Sunni Mahomedans, and vested the control and management of the mosque solely in Rhanderias (Sunni Mahomedans from Rhander near Surat). Held, that the transactions which took place in 1871 and 1872 in no way affected the original and then existing trust, and that the trust deed did not create a new dedication, but the mosque remained as before a public mosque dedicated to the performance of worship by all Sunni Mahomedans as originally founded. With respect to a public religious trust, as distinguished from a private trust, the discretion, under the Mahomedan law, of the Kazi (a discretion, now exercised by the Civil Court) was very wide; for though he could not depart from the intentions of, or the rules made by, the founder as to the objects of the benefaction, yet as regards its management, which must be governed by circumstances, he had complete discretion, his primary duty being to consider the interests of the general body of the public for whose benefit the trust is created. In his judicial discretion he might vary any rule of management which he finds either not practicable or not in the best interests of the institution. Held, therefore, that in settling a scheme

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of management the question was not one involving the determination of conflicting rights, but the consideration of the best method for fully and effectively carrying out the purposes of the trust. Section 539 vested a very wide discretion in the Court, and in giving effect to its provisions and appointing new trustees and settling a scheme the Court was entitled to take into consideration not merely the wishes of the founder so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore in conjunction with other existing conditions that might have grown up since its foundation. The Court also had the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future. Held, also, that on the facts and in the circumstances of this case the Rhaideria section of the worshippers, all other conditions being equal, were preferably entitled to the management of the mosque. *Ibrahim Esmael v. Abdool Carim Peermamode*, [1908] A. C. 526, L. R. 35 I. A. 151, distinguished. The case was accordingly remitted to the Chief Court to form a scheme by which the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which should be in the discretion of the Court with due regard to local needs and conditions, subject to the provision that so long as circumstances do not vary, a majority of such committee should be Rhaiderias, and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any supervisory functions that it may be necessary to confide to

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them and for filling up vacancies on their body subject to its control. *MAHOMED ISMAIL ARIFF v. AHMED MOOLLA DAWOOD*, (1916) I. L. R. 43 Calc. 1085

Management, right of: See **MAHOMEDAN LAW—ENDOWMENT** ... 1085

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Measure of Damages: See **DAMAGES** ... 493

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Mesne Profits: See **JURISDICTION** ... 650

Miner: See **INSOLENCY** 1157

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Mistake—Suit to set aside previous decree on ground of mistake—Competence of compromise and decree thereon—Rectification—

Fraud A decree can be set aside by suit on the ground of fraud if of the required character. But a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree made a mistake. *Jogeswar Atha v. Ganga Bushnu Ghattack*, 8 C. W. N. 473, dissenting from *Mahomed Golab v. Mahomed Salliman*, I. L. R. 21 Calc. 612, *Sudho Misser v. Golab Singh*, 3 C. W. N. 375, and *Bhanda Singh v. Doelat Ray* 17 C. W. N. 82, 15 C. L. J. 675, referred to.

While in the case of a compromise, as the contract is capable of being rectified for an appropriate mistake, so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract. *Huddersfield Banking Co. Ltd. v. Henry Lister and Son, Id.* [1895] 2 Ch. 273, followed. *Kusodihia Bhukta v. Braja Mohan Bhukta* (1915), I. L. R. 43 Calc. 217

Mitakshara: See **HINDU LAW—JOINT FAMILY** 1031

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Ch. II, S. XI, paras. 9, 11,
25: See HINDU LAW—STRIDHAN

Mortgage—Equitable mortgage—Security, scope of—Title-deeds deposited as security, and endorsement made on promissory note given—Addition subsequently made to memorandum endorsed on note—Scope of security limited to original memorandum. Where title-deeds of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title-deeds. Where, however, title-deeds are handed over accompanied by a bargain, that bargain must rule. Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security. *Shaw v. Foster*, L.R. 5 E. & I. App. 321, per Lord Cairns, followed. On obtaining a loan, the defendants executed a promissory note and made an endorsement on it: "As security, grant of a house in 14th Street," to which admittedly some months afterwards, words were added which caused the endorsement to read "As security, grant of a house in Strand Road and 14th Street." There was, in their Lordships' opinion, satisfactory evidence for the defendants of identification to show that the security consisted of only one house, and that the references to it in books of account and elsewhere, were always in the singular: and on the other hand, the plaintiffs, the persons holding the security, on whom it lay to clearly satisfy the Court of the scope of the security, had failed to do so: Held, therefore, (upholding the appellate decision of the Chief Court), that the scope of the security was limited by the original endorsement on the note. *PRANJI VANDAS JAGJIVANDAS MEHTA v. R.*

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CHAN MA PHEE (1916) I. L. R.
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Gross and culpable negligence of vendor (first mortgagee) in leaving title-deeds with vendee (mortgagor)—Whether prior mortgage postponed thereby in favour of subsequent mortgage by deposit of title-deeds—Search in Registration office—Constructive notice—Priority of Transfer of Property Act (IV) of 1882, ss. 3, 78. Section 78 of the Transfer of Property Act makes its three ingredients "fraud, misrepresentation or gross negligence" disjunctive and one cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive. *Monendra Chandra Nandy v. Troyluckho Nath Burial*, 2 C. W. N. 750, discussed and distinguished. *Waller v. Linzm*, [1907] 2 Ch. 104, followed. Neglect to recover the title-deeds by a vendor from a vendee who has secured the greater part of the purchase-money to the vendor by giving him a mortgage on the property itself, when the vendor has full notice that the vendee is impudent and a bad paymaster, and thereby the vendee is enabled to obtain a second mortgage on the property by deposit of the title-deeds, is gross and culpable negligence (which postpones the prior mortgagee), and is rendered more so by a deliberate suppression of the existence of the mortgage in the sale deed and a suggestion that the purchase-money was required in cash and paid accordingly. *Colyer v. Finch*, 5 H. L. 905, followed. Registration not being itself notice, a search made by the clerk to the solicitor to the vendee (mortgagor), who has an interest to conceal the encumbrance from the second mortgagee, cannot saddle the latter with notice of the encumbrance. *Madras Building Company v. Rowlandson*, I. L. R.

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13 Mad. 383; I. L. R. 15 Mad. 286, and <i>Manji Karimbhai v. Hoorbai</i> I. L. R. 35 Bom. 342, followed. <i>NANDA LAL ROY v. ADDUL AZIZ</i> (1916) I. L. R. 43 Calc. ...	1052		
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Municipality — <i>Roads which rest in the Municipality—Public, when they have a right to go over private path- way—Difference between roads vested in the Municipality and others as regards Municipality's rights—Bengal Municipal Act (Beng. III of 1884), ss. 30, 31,</i> Under s. 31 of the Bengal Municipal Act as amended by recent legislation, private pathways do not vest in the Municipality. <i>Chair- man of the Howrah Municipality v. Khetra Krishna Mitter</i> , I. L. R 33 Calc. 1290, followed <i>Kumud Bandhu Das Gupta v. Kishori Lal Goswami</i> , (1911) S. A. No. 488 and 838 of 1909 (unrep.), and <i>Kamal Kamini Debi v. Chairman, Howrah Municipality</i> (1909) S. A. No. 2134 of 1907 (unrep.), dissent- ed from The Municipality may, however, have control over such a pathway, if the public have a right to go over it, as provided for in section 31 of the Bengal Municipal Act. The difference between roads vested in the Municipality and other roads is that in the former case the Municipality is responsible for lighting, watering, sewerage and clearing the roads, and in the other case, the Municipality has only the power of control to prevent the road from becoming a nuisance, or the rights of the public from being interfered with. <i>Chairman, Howrah Municipality v. HARIDAS DATTA</i> (1915) I. L. R. 43 CALC.	130		
Mussalman Wakf Validating Act (VI of 1913), s. 3: <i>See WAKF, VALIDITY OF</i>	158		
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		—Incidents of another tenancy under the same landlord but in different localities in the occupa- tion of the occupancy raiyat— <i>Bengal Tenancy Act (VIII of 1885)</i> , s. 182. The provisions of the Bengal Tenancy Act are appli- cable to a tenancy for building a shop in a market in which the tenant afterwards came to reside, where the tenant has occupancy right on certain jamus under the same landlord in a different village from before the acquisition of the tenancy for building the shop. <i>Golam Moula v. Abdool Sowar Mouful</i> , 13 C. L. J. 255 <i>Protap Chandra Das v. Bisveswar Pra- manick</i> , 9 C. W. N. 416, <i>Kripa Nath Chakrabutty v. Sheikh Anu</i> , 10 C. W. N. 944, and <i>Harihar Chatterji v. Dina Bera</i> , 14 C. L. J. 170, referred to <i>BHUKARI- RAM BHAGAT & MAHARAJ BAHDUR SINGH</i> (1915) I. L. R. 43 Calc. ...	195
Offerings to a Temple—Transferability			
<i>Transfer of Property Act (IV of 1882), s. 6, cl. (a).</i> There are			

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particular class. Similarly a right to receive offerings from pilgrims, resorting to a temple or shrine, is inalienable. The chance that future worshippers will give offerings is a mere possibility and as such it cannot be transferred. *Lalhsmanaswami Naidu v. Rangamma*, I. L. R. 26 Mad. 31, *Kashi Chandra v. Kailash Chandra*, I. L. R. 26 Calc. 356, *Dino Nath Chuckerbutty v. Pratap Chandra Goswami*, I. L. R. 27 Calc. 30, referred to. *PUNCHA THAKUR v. BINDESWARI THAKUR* (1915) I. L. R. 43 Calc. ... 28

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Partnership—Contract Act (IX of 1872) s. 180—Bailor and bailee—Either may maintain an action against a wrong-doer—What constitutes partnership—Partner entitled to purchase partnership property—Action for settled account.

A partnership is constituted whenever the parties have agreed to carry on business or to share the profits in some way in common. *Mollie, March v. Court of Wards*, 19 B. L. R. 312, *Pooley v. Driver*, 5 Ch. D. 458, referred

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to. A partner is entitled to purchase partnership property provided there is full disclosure and the parties are at arm's length. It is only where the real truth is concealed and the facts are not disclosed that one partner has legitimate grievance against another. *Dunne v. English*, L. R. 18 Eq. 524, *Imperial Mercantile Credit Association v. Coleman*, L. R. 6 H. L. 189, referred to. An action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties. *Rauzon v. Samuel*, (1839) Cr. & Ph. 161, *Preston v. Strutton*, 1 Anst. 50, referred to. Section 180 of the Contract Act provides that if a third person deprives the bailee of the use or possession of the goods bailed or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case, if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury. *Giles v. Grover*, 6 Bligh N. S. 277, *Jefferies v. G. W. Railway Company*, 5 El. & Bl. 802, *Manders v. Williams*, 4 Exch. 339, referred to. *RAMNATH GAGOI v. PANCHABAR DEB GOSWAMI* (1915), I. L. R. 43 CALC. 733

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Penalty—Court Fees Act (VII of 1870), s. 19 E—Scope of the section—Suit to recover penalty by Secretary of State, maintainability of—Decision of Revenue authority—Jurisdiction of Civil Court Unless there is a statutory bar, suit is maintainable by the Secretary of State for India in Council for recovery of a penalty lawfully imposed. A Civil Court has no jurisdiction to review the decision of a Revenue authority on the ground that the valuation had been incorrectly made or that the discretion in the imposition of the penalty had been erroneously exercised. But the position is different when the order for imposition of penalty is assailed on the ground that it has not been made in accordance with the statute. If the action of the Revenue authority is <i>ultra vires</i> , if he has not followed the procedure prescribed by the statute which is the source of his authority, there is no enforceable claim which a Civil Court is bound to recognize. <i>Manekji v. Secretary of State for India</i> , (1896) Bom. P. J. 529, followed. Section 19 E of the Court Fees Act, 1870, contemplates an application on the part of the person who has taken out probate and produces the same to be duly stamped. It further contemplates that the estimated value of the estate is less than what the value has afterwards proved to be. <i>A.G. v. Freer</i> , 11 Price 183; <i>Bradlaugh v. Clarke</i> , L. R. 8 A. C. 354; <i>Caethorne v. Campbell</i> , 1 Anst. 214; <i>In the goods of Omda Bibee</i> , I. L. R. 26 Calc. 407; <i>In the goods of Stevenson</i> , 6 C. W. N. 898, referred to <i>NIKUNJA RASI CHOW-</i>	
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—Form of plaint—Suit against Corporations Defendant, misdescription of—Service on Corporations—Civil Procedure Code (Act V of 1908) O. XXIX, rr. 1 and 2—Practice. In a plaint filed against two companies, the defendant companies were described as "the India General Steam Navigation and Railway Company, Limited, and the Rivers Steam Navigation Company, Limited, by their joint agent A. E. Rogers" and notice was served on Mr. Rogers. Subsequently Mr. Rogers retired from the service of the Companies and left the country. At the trial of this suit, the plaint was	

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amended and Mr. Rogers' name was omitted from the title of the suit which was proceeded with against the two Companies. *Held*, that the plaint as originally framed was in contravention of O. XXIX, r. 1 of the Code of Civil Procedure. *Ram Das Sein v. Stephenson*, 10 W.R. 366, *Nubeen Chunder Paul v. Stephenson*, 15 W.R. 534, and *Campbell v. Jackson*, I.L.R. 12 Calc. 41, referred to *Held*, also, that the amendment might stand, but the plaintiffs were bound to serve notices of the suit in the manner provided in O. XXIX, r. 2, after the amendment had been made and the suit properly constituted. *INDIA GENERAL S. N. & R. Co., Ltd. v. LAL MOHAN SAHA* (1915), I.L.R. 43 Calc. ... 441

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— : See **VALUATION OF SUIT** ... 225

— : *Execution of decree—Civil Procedure Code (Act V of 1908) O. XXI, r. 41—Judgment-debtor, examination of—Application by judgment-debtor to have order for examination set aside.* An application under O. XXI, r. 41, of the Civil Procedure Code, 1908, made *ex parte* on a verified tabular statement, is in order. The judgment-debtor is entitled to be heard to have such order set aside, but he should apply on summons. The object of O. XXI, r. 41 is to obtain discovery for purposes of execution to avoid unnecessary trouble in obtaining satisfaction of money decrees. Although an order for personal examination is likely to operate harshly and cause unnecessary harassment and obviously ought not to be made unless the Court is satisfied about the *bond fides* of the application and its urgent necessity, still such applications may be usefully encouraged to prevent unduly dilatory, troublesome and expensive execution proceedings. *In re Premji Trikumadas*, I.L.R. 17 Bom 514, referred to. *NATIONAL BANK OF INDIA, Ltd. v. A. K. GHUZAVI* (1915) I.L.R. 43 Calc. 285

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— : *Towns Insolvency Act (III of 1909), s. (8) (2) (b): See INSOLVENCY* 243

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Construction of Power of Attorney—Denial of authority of agent—Chetty money-lending firm, business of—Power implied from nature of business which could not be carried on without it—Proof of similar previous transactions with objection by principal—Account books, presumption to be drawn from—Evidence Act (I of 1872), s. 114. The defendant was a Chetty and had a large money-lending business in Rangoon which he carried on by an agent to whom he gave a power of attorney for the general management of his business in which he stated the duties and powers entrusted to him as being, "to transact, conduct and manage all affairs, concerns, matters and things" in which he "may be in anywise interested and concerned," and for that purpose "to use or sign my name to any document or writing whatsoever; to borrow money from any bank or banks, firm or firms, person or persons either with or without pledge of securities for money advanced to various persons," and "to make, draw, sign, accept, endorse negotiate and transfer all and every or any bills of exchange, promissory notes, bundles, cheques, drafts, bills of lading and all other negotiable securities whatsoever to which my signature or endorsement may be required or which my said attorney may in his absolute discretion think fit to make, draw, sign, accept, endorse, negotiate and transfer in my name and in my behalf." Under this power the agent pledged the firm's credit with the plaintiff Bank to enable a client who applied to him for financial assistance to have a cash-

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he executed a promissory note in favour of defendant's firm which the agent endorsed over to the Bank in conformity with the provisions of the Presidency Banks Act (XI of 1870), section 37, cl. (e), the agent at the same time giving the Bank a letter of guarantee on behalf of his firm. The client, after drawing large sums of money on the cash-credit account thus opened, having become insolvent, the Bank brought an action for the amount due, to which the defense was a denial of authority on the part of the agent to enter into the transactions so as to bind the defendant's firm. Held (reversing the decision of an Appellate Bench of the Chief Court), that applying the principles of construction of powers of attorney laid down in *Bryant, Poole and Bryant v. La Banque du Peuple*, [1893] A. C. 170, the authority to enter into transactions of the nature in dispute in the present case, was to be found in the document itself by necessary implication from the nature of the business with the general management of which the agent was entrusted without such authority it would hardly have been possible to carry on the business of a money-lender and financier. On the evidence, moreover, it was proved that amongst such Chetty money-lending firms it was the practice for the agent to pledge the credit of the firm; and that for a considerable time similar transactions had been entered into previously by the agent without his authority being questioned. The mere fact that the defendant did not receive any benefit on the transaction would not (if it were the case) relieve him of liability, if the authority of the agent was

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established : but the defendant's books of account which were called for and not produced, would presumably have shown such transactions, and the receipt of commission on them. *BANK OF BENGAL v. RAMANATHAN CHEITY* (1915), I. L. R. 43 Calc. ...

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Liability of principal for fraudulent conduct of the agent—Scope of the agent's or servant's employment—Unauthorised acts—Scope of agency—Tort. The principal is liable to third persons in a civil suit for the frauds, deceptions, concealments, misrepresentations, torts, negligence and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them. The principal is not liable for the torts or negligences of his agent in any matter beyond the scope of the agency unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit. *McGowan v. Dyer*, L. R. 5 Q. B. D. 141, *Hern v. Nichols*, 1 Salkeld 289, *National Exchange Company v. Drew*, 2 Macq. H. L. 103, *Brocklesby v. Temperance P. B. Society*, [1895] A. C. 173, *Pearson v. Dublin Corporation*, [1907] A. C. 851, *Citizen's Life Assurance Company v. Brown*, [1904] A. C. 423, *Glasgow Corporation v. Lorimer*, [1911] A. C. 209, *Buckles v. Stewart*, 1 Sch. & Lef. 209, *FitzSimons v. Duncan*, 2 I. R. 483, *Subjan Bibi v. Sariatulla*, 3 B. L. R. 413, *Morrison v. Verschoyle*, 6 C. W. N. 429, *Isurur Chunder v. Satish Chunder*, I. L. R. 30 Calc. 207, *Gopal Chandra v. Secretary of State*, I. L. R. 36 Calc. 647, *Motilal v. Gorudram*, I. L. R. 30 Bom. 83, *British M. B. Co. v.*

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Charnwood Forest Ry. Company, 18 Q. B. D. 714, *Mackay v. Commercial Bank*, L. R. 5 P. C. 394, *Sure v. Francis*, 3 A. C. 106, *Houldsworth v. City of Glasgow*, 5 A. C. 317, referred to. *Lloyd v. Grace*, [1912] A. C. 716, and *Rubens v. Great Fingall*, [1926] A. C. 439, followed. *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, and *Burma Trading Corporation v. Mirza Mahomed Ally*, I. L. R. 4 Calc. 116, explained. Acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent even though he did not in fact authorise the commission of the fraudulent act. This rule of liability is based upon grounds of public policy. It seems more reasonable that where one of the two innocent persons must suffer from the wrongful act of a third person the principal who has employed and retained a dishonest agent and has placed him in a position of trust and confidence, should suffer for his mis-deed rather than a stranger. *SHERIAN KHAN v. ALIMUDDI*, (1915) I. L. R. 43 Calc. ...

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Suit for Accounts

Hypothecation of property as security for the proper discharge of his duties by the agent—Agreement to render accounts annually—Limitation Act (IX of 1908), Sch. I, Arts. 89, 115, 132—Death of the principal, effect of—Agent continuing in service of the heir—Contract Act (IX of 1872), ss. 207, 253, cl. (10)—Method to be adopted for rendering accounts. Where certain immovable properties were hypothecated to the principal by the defendant as security for the valid discharge of duty as agent, in a suit for accounts by the principal : Held, that Art. 132 of the Limitation Act will apply, inas-

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much as it is also by implication a suit to enforce a charge. *Hafizuddin Mandal v. Jadu Nath Saha*, I. L. R. 35 Cal., 298, followed. *Jogesh Chandra v. Benode Lal Roy*, 14 C. W. N. 122, dissented from. On the death of the principal, an agency is terminated and a new agency is created if the agent continues in service of his principal's heir. Where there is an agreement to submit accounts annually, in a suit against the agent for an account Art. 89, and not Art. 115, of the Limitation Act will apply. *Shib Chandra Roy v. Chandra Narain Mukherjee*, I. L. R. 32 Cal., 719, and *Ashgar Ali Khan v. Khurshed Ali Khan*, I. L. R. 24 All. 27, followed. *Fasim v. Baroda Kishore*, 11 C. L. J. 43, dissented from. Duty of an agent does not end by merely submitting papers when accounts are demanded but a failure to explain them when called upon to do so will amount to a refusal under Art. 89 of the Limitation Act. *Hurnirath Rai v. Krishna Kumar Bakshi*, I. L. R. 14 Calc. 147, relied on. *Chand Ram v. Brojo Gobind*, 19 W. B. 14, *Upendra Kishore v. Ramtara Debba*, 13 C. W. N. 696, not followed. *MADRUSUDAN SEN v. RAJENAH CHANDRA DAS BASAK*, (1915) I. L. R. 43 Calc.

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Probate, suit to revoke: See DECLARATORY DECREE, SUIT FOR ...

Probate—Succession duty—Court Fees Act (VII of 1870), s. 19 (c) as amended by Act XIII of 1875, s. 19 (c)—Death of the first executrix—Application for second probate—Duty payable, if any, on second probate. When an executor,

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to whom probate has been granted, dies leaving a part of the testator's estate unadministered and a new representative is appointed for the purpose of completing the administration, there being no new succession and no new devolution of the estate, no fresh succession duty should be levied. What the Legislature appears to have intended is that where the full fee, chargeable under the Court Fees Act on a probate, at the time it is granted, has been paid, no further fee shall be chargeable when a second grant is made in respect of that property ...

Case 733, In the goods of Innes, 16 W. B. 253, *In the goods of Balthazar*, (1908) I. L. R. 255, *In the goods of Ameerun*, 15 W. B. 496, *Webster v. Spencer*, 3 I. & A. 360, *Cummins v. Cummins*, 3 I. & A. 64, *In the goods of Bell*, I. L. R. 2 P. & D. 247, *Anon v. Freeman* 313, *Anon. 1 Ch. Cas. 265*, and *Brent v. Brent, 1 Myl & Cr. 104*, referred to. *SWARANMALEE DEBI v. SECRETARY OF STATE FOR INDIA*, (1915) I. L. R. 43 Calc. ...

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<i>Sale by Receiver—Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, authority of, to sell property and execute the conveyance including share of infant defendant—Practice—Trustees Act (XV of 1866), ss. 8, 20 and 32.</i> In a partition suit in which a Receiver is authorised to sell properties, there can be no difficulty in directing him to convey the properties. Under O. XL, r. 1, cl. (d) of the Code, the Court may confer on a Receiver all such powers for the realisation of properties and the execution of documents as the owner has. The Receiver may be, therefore, directed to execute a conveyance including the share of an infant defendant. In all sales whether by the Court or under the Court or by direction of the Court out of Court, the purchaser is bound to satisfy himself of the value, quantity, and title of the thing sold, just as much as if he were purchasing the same under a private contract. The sale certificate does not transfer the title; it is evidence of the transfer. <i>Minatoonnessa Bibee v. Khatounnessa Bibee</i> , I. L. R. 21 Calc. 479, <i>Golam Hossein Cassim Arif v. Fatima Begum</i> , 16 C. W. N. 394, and <i>Davis v. Ingram</i> , [1897] 1 Ch. 477, referred to. <i>BASIR ALI v. HAFIZ NAZIR ALI</i> , (1915) I. L. R. 43 Calc. ...	239	
Records, power to call for—Special Tribunal—Calcutta Improvement Act (Beng. V of 1911), r. 71, cl. (c)—Land Acquisition Act (I of 1894), s. 55—Practice. The power to call for records is a power which is undoubtedly inherent in the Judge of a Land Acquisition Court and conse-		
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quently in the Special Tribunal constituted under the Calcutta Improvement Act. <i>Golap Coomary Dossee v. Raja Sundar Narayan Deo</i> , 4 C. L. R. 36, followed. <i>NARESH CHANDRA BOSE v. HIRA LAL BOSE</i> , (1915) I. L. R. 43 Calc. ...		
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Remand—Remand after addition of parties by Appellate Court—Amendment of plaint—Whether whole case remanded in consequence—Civil Procedure Code (Act V of 1908), s. 107, O. XLI, rr. 23, 25. There are other possible cases of remand which are not included in O. XLI. <i>Nobin Chandra Tripathi v. Prankrishna De</i> , I. L. R. 41 Calc. 108, distinguished. In the Code of Civil Procedure, 1908, the Legislature has given the power of amendment to the Court of Appeal and, as a necessary outcome, it has the power of remanding the whole case when an amendment of plaint is granted and when parties are added. The general provision in s. 107 for a remand is not governed or limited by O. XLI alone, but is subject to such conditions and limitations as may be prescribed in the rules and orders, the amendment of a plaint		
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zamindar under a kabuliat with the Government made by his predecessor in title in 1801, sued to eject from a jagir within his zamindari paik in his service whom he had dismissed from his service with notice to quit. The Secretary of State for India, now sole respondent, was also made a defendant, as the Government disputed the zamindar's right to dismiss the paik. The plaintiff's case was that there were two classes of paiks, the Government paiks, who performed police duties and who could be dismissed only by the Government, and that class alone came within the terms of the kabuliat, and private paiks who performed services personal to the zamindar, and that the paik in suit belonged to the latter class and the zamindar was therefore entitled to dismiss him. Both the Subordinate Judge and the District Court held that the paik defendant did not come within the terms of the kabuliat, and found concurrently on the facts in favour of the plaintiff's contentions, but the District Judge gave no specific reasons for his decision. The High Court admitted a second appeal by the respondent on an issue not previously raised in the case, "whether the land in suit had been excluded from assessment at the settlement in 1792 as being appropriated for the maintenance of paiks performing police duties," and whilst agreeing with the lower Courts on the construction of the kabuliat, ignored the findings of fact, and remanded the appeal for the trial of the fresh issue, making the plaintiff who had succeeded, pay all the costs then incurred. Held, that the High Court in second appeal was by section 584 of the Code of Civil Procedure, 1882, then in force, bound by the findings of fact of the District Judge who "had considered the evidence and saw no

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reason for differing from the findings of the Subordinate Judge." The High Court could therefore only allow the appeal on a ground of law, and on the only question of that Court agreed with the Court below. Even if it were competent to the High Court to remit a case for re-hearing on an issue not raised in the pleadings or even suggested in the Courts below, it ought only to be done in an exceptional case for good cause shown, and on payment by the party appealing of all costs. The respondent did not suggest he was taken by surprise or had discovered fresh evidence of which he was previously unaware. The omission to raise the issue early in the case appeared to be deliberate, the onus of proving it was on the respondent, and there was little, if any, evidence to support it. The appeal was consequently allowed. RAM CHANDRA BHANJ DHO v. SECRETARY OF STATE FOR INDIA, (1916) I. L. R. 43 Calc. ...

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—*Remand on a preliminary point*
—*Powers of lower Appellate Court to reverse and remand—Civil Procedure Code (Act V of 1908), s. 107, sub-s. (1), cl. (b), sub-s. (2), O XLII, r. 23.* As the body of the Code creates jurisdiction (while the rules indicate the mode in which it is to be exercised), it is expressed in more general terms, but has to be read in conjunction with the more particular provisions of the rules. S 107, sub-s. (1), cl. (b) of the Code is subject to the conditions and limitations prescribed by the rules, and in the case of a lower Appellate Court, the power of reversal and remand is limited to the position described in rule 23, Order XLII. MANI MOHAN NANDAL v. KANTARAM MANDAL, (1915) I. L. R. 43 Calc. ...

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Rent, suit for—Title Paramount, dispossession by—Onus of proof—Apportionment of rent—Evidence

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Act (I of 1872), s. 102. Where a tenant is sued for rent, he can set up eviction by title paramount to that of his lessor as an answer; and if evicted from part of the land, an apportionment of the rent may take place, but the onus is on the lessor to show what is the fair rent of the lands out of which the tenant was not evicted *Gopanund Jha v. Lalla Gobinda Prosad*, 12 W. R. 109, referred to. *SURENDRA NARAIN Roy CHOWDHURY v. DINA NATH BOSE*, (1915) I. L. R. 43 Calc. ...

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Evidence—*Previous ex parte rent decree, admissibility of, as evidence of relationship between parties—Presumption of continuance thereof—Evidence Act (I of 1872), s. 114, illus. (d).* A previous *ex parte* rent decree (between the same parties) is not merely an item of evidence, but is conclusive as to the relationship between the parties at that time. Its value becomes more apparent since the terms of s. 114, illus. (d) of the Evidence Act permit the Court to make a presumption as to the continuance of the state of things. *HIRANMOY KUMAR SAHA v. RAMJAN ALI DEWAN*, (1915) I. L. R. 43 Calc. ...

Res Judicata: *See HINDU LAW—ALIENATION BY WIDOW* ...

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, rule of: *See DECLARATORY DECREE, SUIT FOR* ...

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Rescue from lawful Custody—*Lawful apprehension, resistance to—Opium—Person selling article as opium which turns out not to be the same—Arrest and detention of such person—Legality of arrest—Escape from such arrest—Opium Act (I of*

as opium) which afterwards turns out not to be the same and he is

Rescue from lawful Custody—concl.

arrested but escapes with the aid of others:—*Held*, that his arrest and detention are lawful under s. 15 of the Opium Act (I of 1878), and that his conviction under s. 224 and that of the others under s. 225 of the Penal Code are legal. It is an offence for a person to escape from custody, after he has been lawfully arrested on a charge of having committed an offence, although he may not be convicted of such latter offence. *Deo Sahay Lal v. Queen-Empress*, I. L. R. 28 Calc. 253, approved. *MOHAMMED KAZI v. EMPEROR*, (1916) I. L. R. 43 Calc. ...

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Residence: *See SECURITY FOR GOOD BEHAVIOUR* ...

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Revenue Sale Law (Act XI of 1859), s. 54: *See SALE FOR ARREARS OF REVENUE* ...

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Reversionary Interest: *See HINDU LAW—PARTITION* ...

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Revisional Jurisdiction of High Court: *See SANCTION FOR PROSECUTION* ...

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Reviver—Procedure and practice—

Execution of decree—Decree barred by limitation—Application for transmission—Notice—Order on the notice, effect of—Master, authority of—Court, Jurisdiction of—Civil Procedure Code (Act XIV of 1882) ss. 223, 224, 235, 248 and 249—Belchambers' Rules and Orders, rule 170—Limitation—

Revivor—*contd.*

defendant. This decree was subsequently transmitted to the District Court of Purnea for execution, but was returned by that Court as unsatisfied. Thereafter, another application for execution by arrest and imprisonment of the defendant was made to the High

another application to the High Court on the tabular form provided under s. 235 to the Code of Civil Procedure, 1882, for execution of their said decree by transmission of the same to the District Court of Murshidabad and attachment of the defendant's property situate within the jurisdiction of the latter Court, and the Registrar directed notice to issue on the defendant under s. 248 (a) of the Code. On the 30th June, 1908, the defendant not having appeared to show cause, the Master ordered execution to issue as prayed. Again no steps were taken until the 18th January, 1915, when a fresh application was made to the High Court for execution by attachment of No. 147, Cotton Street, in Calcutta. The

order on appeal to the High Court in its Appellate Jurisdiction, reference was made by this Court to a Full Bench *Held*, that the application of the 1st June, 1908, and the order of the 20th June, 1908, did not constitute a revivor within Art. 183 of the 1st Schedule of the Limitation Act, 1908. *Per* SANDERSON C.J. The substance and not the form of the

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together with a certificate of non-satisfaction and no more, and the order made in substance was that the application should be granted. The notice which was issued under s. 948 was inapplicable to the proceedings in question. The question whether a decree was capable of execution would have to be determined by the Court itself under s. 249 of the Civil Procedure Code. The Registrar was not clothed with authority to decide such a question as arises in this case, viz., whether the decree was barred by the Statute of Limitation, Rule 370 in Belchambers' Rules and Orders was not consistent with the scheme of the Code of 1882. These rules must be read as modified by the Civil Procedure Code, 1882, under which the application in this case was made, and the notice issued and the order made did not operate as a revivor within the meaning of Article 183 of the Limitation Act, Schedule I. The fact that the word "revivor" is used in Article 183, instead of the different matters specified in Article 182 being set out again or referred to in Article 183 as might have been done, shows that something different to such matters was intended. Further, the conditions dealt with by the two clauses are essentially different and the periods of limitation vary materially. *Per* WOODBORE J. An order for transmission as such, is not an order on an application for execution, though it is an order on an application in execution. It is a proceeding taken with a view to further action by way of execution elsewhere on which action unless previously determined the question of the right to execute the decree is decided. If the Registrar had power to issue as a "quasi-judicial Act" notice under s. 248, he had no power to determine judicially that the decree was alive had the

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debtor contested the point. The Judge must have done that and the fact that the debtor did not appear on the notice, cannot give the order passed that judicial character which is necessary for an order operating as revivor. The last two words of the Order ("Let execution issue as prayed") make the order operative as one for transmission of the decree; for this was what was asked. *Per Mookerjee J.* Section 230 makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution, while the explanation to section 248 shows that the notice required by that section must, where the decree has been transmitted, be issued by the Court to which the decree has been sent for execution. Consequently, the issue of the notice in this case under section 248, on the basis of the application for transmission of the decree, was not in conformity with the Code of 1882 which was in force at the time. Upon the application for transmission of the decree under section 223, a notice under section 248 could not properly be issued; such notice though issued did not by itself operate as revivor of the decree and there was not in fact, and could not in law be, such a determination by the Master under section 249 as would operate to revive the decree. *CHITTERUT SINGH v. SAIT SUMARI MULL.* (1916) I. L. R. 43 Calc. 903

Rhanderias: *See* MAHOMEDAN LAW—ENDOWMENT 1085

Right of Reply—Exhibiting documents, not part of the record, on behalf of the accused during the cross-examination of the prosecution witnesses—Doctrine of surprise—Criminal Procedure Code (Act V of 1898), ss. 289 and 292. Section 292 of the Criminal Procedure Code is not to be read independently but in

Right of Reply—*concl'd.*

connection with s. 289, and gives a right of reply only when the accused, or any of them, adduces evidence after the case for the prosecution has concluded. The prosecution has no right of reply when the counsel for the accused has, during the cross examination of a prosecution witness and before the close of the case for the Crown, put certain letters, which do not form part of the record, to such witness, and then tendered and had them admitted in evidence. The question whether the prosecution has been taken by surprise is not the correct test under s. 292 of the Code. *EMPEROR v. SREENATH MAHAPATRA,* (1916) I. L. R. 43 Calc. 426

Road: *See* MUNICIPALITY 130

Sale: *See* RECEIVER 124

Sale, setting aside of: *See* DEPOSIT IN COURT 100

Sale—Execution of rent-decree—Encumbrances—Bengal Tenancy Act (VIII of 1885), ss. 159, 163 to 167—Decree for arrears of rent—Sale under the Bengal Tenancy Act, effect of—Purchase by landlord Where a tenure is sold under the provisions of the Bengal Tenancy Act in execution of a decree for arrears of rent, and the procedure prescribed in the Act has been observed, the result therein described as follows, namely, the purchaser becomes entitled to annul all encumbrances other than registered and notified encumbrances; the consequence of the sale does not depend upon the amount of the bid offered by the successful purchaser; it is independent of the value of the bid. Section 165 of the Act was enacted solely for the benefit of the decree-holder; if the bid is not sufficient to satisfy his decree and costs, it entitles him to have the property sold with power to annul all encumbrances; but it is not obligatory upon him to adopt

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this extreme measure, and he is not in peril if he decides not to pursue this special remedy. *Bambhani Kapur v. Khetia Pal Singh Roy*, I. L. R. 38 Calc. 923, not followed. *SALIMULLAH v. RAHENUDDI*, (1915) I. L. R. 43 Calc. 263

—Immoveable property—Transfer of Property Act (IV of 1882), s. 54—District Board, sale by—Incorporated Company—Suit, dismissal of—Contract, rescission of—Waiver—Respondent—Cross-objections—Civil Procedure Code (Act V of 1908), O. XLI, rr. 22 (3), 33—Corporation, duty of, when it receives money under an illegal or ultra vires agreement. Section 54 of the Transfer of Property Act provides that a sale of tangible immoveable property of the value of Rupees 10/- and upwards can be made only by a registered instrument. Title to land, therefore, cannot pass by a mere admission when the statute requires a deed. *Jadu Nath v. Rup Lal*, I. L. R. 33 Calc 967, *Dharam Chand v. Manj Sahu*, 16 C. L. J. 436. *Narak Lall v. Mangon Lall*, 22 C. L. J. 380, referred to. *Hemendra Nath Mukerjee v. Kumar Nath Roy*, I. L. R. 32 Calc. 169, distinguished. The effect of Rules 93 and 98 of the Statutory Rules made by the Lieutenant-Governor on the 15th December 1885 under s. 138 (d) of Beng. Act III of 1883, is that no immoveable property vested in a District Board can be sold, except with the previous approval of the Local Government and except by an instrument under the common seal signed by the Chairman and by two members of the Board. It is a well settled principle of interpretation that Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation has

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not by any means a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons. *Bileshwar v. Bhagirathi*, I. L. R. 35 Calc. 701, referred to. When a public body or a Company is established by statute or is incorporated for special purposes only and is altogether the creature of Statute Law the prescriptions for its acts and contracts are imperative and essential to their validity. *Ward v. Beck*, 13 C. B. (N. S.) 668, *Stapleton v. Haymen*, 2 H. & C. 918, *The Andalusan*, L. R. 3 P. D. 182, *Le Feuvre v. Miller*, 8 E. & B. 321, *Cops v. Thames Haven*, 3 Exch. 841, *Diggle v. London and Blackwall Ry.* 5 Exch 442, *Frend v. Dennett*, 4 C. B. (N. S.) 576, *Cornwall Mining Co. v. Bennett*, 5 H. & N. 423, *Irish Peat Co. v. Phillips*, 1 B. & S. 598, *Bottomley's Case*, 16 Ch. D. 681, and *In re Gifford and Bury Town Council*, 20 Q. B. D. 368, referred to. A suit need not be dismissed merely because the authority for its institutions such as a certificate under the Pensions Act, 1861, or section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act or section 4 of the Succession Certificate Act is not produced with the plaint. But this principle has no application to a case where the plaintiff at the date of the institution of the suit had no title at all. *Sarat Chandra v. Apurla Krishna*, 14 C. L. J. 55, referred to. One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former, but, if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first and the two must be construed together, where the new contract is consistent with the continuance of the

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former one, it has no effect unless and until it is performed. *Hunt v. South Eastern Ry. Company*, 45 L. J. C. P. 87, *Dodd v. Churton*, [1897] 1 Q. B. 562, *Patmore v. Colburn*, 1 Ct. M. & R. 65, *Thornhill v. Neats* 8 C. B. (N. S.) 831, referred to. But where parties enter into a contract which, if valid, would have the effect, by implication, of rescinding a former contract and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction. *Noble v. Ward*, 4 H. & C. 149; L. R. 1 Exch. 177, *Des dem. Biddulph v. Poole*, 11 Q. B. 713, referred to. Where the question is, whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. *Mersey Steel and Iron Company v. Naylor Benzon & Co.*, 9 App. Cas. 434, *General Bill-posting Co. v. Atkinson*, [1908] A. C. 118, referred to. The Court requires as clear evidence of the waiver as of the existence of the contract itself, and will not act upon less. *Carolan v. Brabazon*, 3 J & L. 200, referred to. Where a corporation receives money or property under an agreement, which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others, without authority, the law, independently of express contract, will compel restitution or compensation.

Sale—concl.

Chapleo v. Brunswick Building Society, 6 Q. B. D. 696, referred to. As an ordinary rule a respondent in an appeal is not entitled to urge cross-objections except as against the appellant. But rule 24(3) of Order XLI of the Code of 1908 has materially altered the pre-existing law by the substitution of the

Further, rule 33 of Order XLI has conferred wide discretionary powers on the Court of Appeal to alter the decree of the Court below as the case may require. *MATHURA MOHAN SAHA v. RAM KUMAR SAHA*, (1915) I. L. R. 43 Calc. ...

Sale Absoluta: See INCUMBRANCE ...

Sale for Arrears of Revenue—Adverse possession—Limitation—Incumbrance—Limitation Act (IX of 1908) Sch. I, Arts. 121, 142, 144—Assam Land and Revenue Regulation (I of 1886), ss. 70, 71.

In a suit for *khas* possession and mesne profits in respect of certain lands purchased by the plaintiff at a sale for arrears of Government revenue, the defendants contended that they had been in adverse possession of the said lands for a long time, that their occupation was in the nature of an incumbrance and that the plaintiffs were not entitled to avoid the same. Held, that the interest which the defendants acquired was an incumbrance within the meaning of Article 121 and the suit was barred by limitation. *Karmi Khan v. Brojo Nath Das*, I. L. R. 22 Calc. 244, and *Nuffer Chandra Pal Chowdhury v. Rajendra Lal Gonwami*, I. L. R. 25 Calc. 167, approved. *Kumar Kalanand Singh v. Syed Sarafat Hossein*, 12 C. W. N. 528, and *Rahimuddil Munshi v. Natini Kanta Lahiri*, 13 C. W. N. 407, distinguished. *PRASANNA KUMAR DUTT v. JAKENDRA KUMAR DUTT*, (1915) I. L. R. 43 Calc. ...

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Sale for Arrears of Revenue—Purchaser of a share—Meaning of the words, "the purchaser shall not acquire any rights which were not possessed by the previous owner or owners"—Revenue Sale Law (Act XI of 1859), s. 5¹. At a sale under s. 13 of Act XI of 1859 it is not the rights of the recorded proprietor that pass, but the share itself. The policy of the revenue law is to protect the revenue and make the share on which the revenue is assessed available for the arrears of revenue due upon it. *Debi Das Choudhuri v. Bipro Charan Ghosal*, I L. R. 22 Calc 641, followed. *Binalata Dasi v. Monmota Nath Goswami*, 11 C. W. N. 821, *Kumar Kalanand Singh v. Syed Sarafat Hossein*, 12 C. W. N. 628, *Rahimuddin Munshi v. Nalini Kanta Lahiri*, 13 C. W. N. 407, *Bilas Chandra Mulherjee v. Akshoy Kumar Das*, 16 C. W. N. 587, *Bhairo ni Koer v. Mathura Prasad*, 7 C. L. J. 1, *Ananda Prosad Ghose v. Rajendra Kumar Ghose*, I. L. R. 29 Calc. 223, and *Gungadeen Misser v. Kheeroo Munwil*, 14 B. L. R. 170, referred to. **KHEMESH CHANDRA RAKHIT v. ABDUL HAMID SIDKAR**, (1915) I. L. R. 43 Calc. ... 46

—**in Execution:** See **FINANCIAL ACT (VIII of 1885)**, ss. 85, 159 178

—**Sale of Goods:** See **CONTRACT** ... 77

—**Contract for forward monthly deliveries—Construction—Anticipatory breach—Measure of damages.** In a contract, dated June 4th, for the purchase of 300 tons of Java sugar, it was stipulated "shipments to be made by steamers during July to December 1914 . . . the agreement to be construed as a separate contract in respect of each shipment." Without giving any delivery, on the 18th August the sellers repudiated the contract. In an action for breach of contract

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Sale of Goods—concl'd brought by the buyer on the 26th August claiming damages in respect of the whole contract, for 300 tons:—*Held*, that on the true construction of the contract, the buyer had the right to demand delivery of the goods by separate shipments spread over the months from July to December, and the true measure of damages was the aggregate of the differences between the contract price and the market price at the appointed times of delivery in each month. *Roper v. Johnson*, L. R. 8 C. P. 167, *Wertheim v. Chicontini Pulp Co.*, [1911] A. C. 301, *Frost v. Knight*, L. R. 7 Ex. 111, and *Brown v. Muller*, L. R. 7 Ex. 319, referred to. **Per MOOKERJEE J.** In the circumstances of the case, the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of the goods. *Calamus v. Douglas Iron Co.*, 47 L. J. Q. B. 575, *Coldring v. Paleologo*, L. R. 2 Ex. 193, referred to. **Thornton v. Simpson**, 6 Taunt. 556, *Tarling v. O'Riordan*, 2 L. R. 182, *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.*, L. R. 12 A. C. 128, cited by Mookerjee J. It being found that the principle applied by the Court of first instance in assessing damages was erroneous, but that on the application of the proper principle the damages to be allowed would be larger, on the defendant's appeal the Court declined to disturb the judgment or order a remand. **BILASRAM THAKERDAS v. GIBBAY**, (1915) I. L. R. 43 Calc. ... 305

—**Sanction for Prosecution—Information to the police reported false—No subsequent application to the Magistrate for judicial investigation—Order of magistrate calling on informant to prove case, and examination of witness—Grant of sanction—See entry of *sanc*tion****

Sanction for Prosecution—contd.

false charge made to the police but not followed by complaint—"Complaint"—Power of Magistrate to direct prosecution himself in such case—"Judicial proceeding"—Criminal Procedure Code (Act V of 1898), ss. 4 (h), 165 (1) (b), 476. No sanction is necessary under s. 195 (1), (b) of the Criminal Procedure Code to prosecute an informant under s. 211 of the Penal Code when a false charge has been made by him only to the police. *Karim Balkh v. King-Emperor*, 2 Cr. L. J. 66, *Bhimaraja Venkateswarulu v. Moova Papulu*, 13 Cr. L. J. 480, *Emperor v. Sheikh Ahmed*, 13 Cr. L. J. 578, followed. But sanction is requisite under the section when he has subsequently preferred a complaint to the Magistrate praying for judicial investigation. *Queen-Empress v. Sham Lall*, I. L. R. 14 Calc. 707, *Jogendra Nath Mukerjee v. Emperor*, I. L. R. 33 Calc. 1, *Queen-Empress v. Sheikh Beari*, I. L. R. 10 Mad. 232, followed. When a person who has laid an information before the police, reported to be false, has not subsequently applied to the Magistrate for an investigation or has not unpugned the correctness of the police report and prayed for a trial, he has not made a "complaint" within the meaning of s. 4(h) of the Code. An order for prosecution cannot be made under s. 476 of the Criminal Procedure Code when the alleged offence under s. 211 of the Penal Code has not been committed in Court, but in relation to a police investigation only. *Dharmadas Kucar v. King-Emperor*, 7 C. L. J. 373, *Jadunath Singh v. King-Emperor*, 10 C. L. J. 564, followed. The procedure of calling on the informant, who is reported by the police to have made a false charge before them to prove his case and the examination of witnesses is not contemplated by the Code, and the

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proceeding is not a judicial one within s. 476 of the Code. *Mouli Durzi v. Naurangi Lall*, 4 C. W. N. 351, followed. *TAYEBULLA v. EMPEROR*, (1916) I. L. R. 43 Calc. 1152

Revisonal jurisdiction of High Court over Presidency Small Cause Court—Civil Procedure Code (Act V of 1903), s. 115—Criminal Procedure Code (Act V of 1898); s. 195—Stage in a judicial proceeding, what is—"Oath"—"Delay" A Judge of the Presidency Small Cause Court, Calcutta, had dismissed six applications for sanction to prosecute the plaintiffs for having made false claims. On an application to the High Court under s. 115 of the Civil Procedure Code to set aside the orders:—*Held*, that under s. 195 of the Criminal Procedure Code the High Court is the superior Court to the Presidency Small Cause Court, and has power to deal with the order which was made by that Court. *Held*, also, that an application for leave to sue is a stage in a judicial proceeding, where such leave is necessary to give the Court jurisdiction. *Held*, also, that the delay in making the application for sanction to prosecute had been satisfactorily explained, and was not in the circumstances such as to prejudice the plaintiffs. *BUDNU LAL v. CHATTU GOPE*, (1915) I. L. R. 43 Calc.

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Sapindas: See HINDU LAW—STRIDHAN

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Scope of Agency: See PRINCIPAL AND AGENT

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Second Appeal: See REMAND ...

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Order of Settlement Officer settling rent, whether open to second appeal—Bengal Tenancy Act, VIII of 1885, ss. 105A (4), 160, 169A—Excess area. Per Curiam: When in a proceeding under s. 105 of the Bengal Tenancy Act the Settlement Officer is asked to increase the rent under sub-s. (4)

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in accordance with the rules laid down in s. 52, and the claim is refused on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, a second appeal is not barred by s. 109A of that Act. *Rameswar Singh v. Bhuneswar Jha*, 4 C. L. J. 138, and *Grant v. Ram Nekha Thakur*, 14 C. L. J. 110, considered *Per Mookerjee J.* If in any proceeding under s. 105 questions under s. 105 have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of questions within the scope of s. 105A, and consequently of s. 106. Such a decision is not one merely settling a rent within the meaning of s. 109A and is consequently liable to be challenged by way of second appeal to the High Court. *JNAVADA SUNDARI CHOWDHURANI v. AMUDI SARKAR*, (1916) I. L. R. 43 Calc.

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v. Emperor, 12 Cr. I. J. 248, dissented from. *Joy Chandra Sarkar v. Emperor*, I. L. R. 38 Calc. 214, *Jaswant Rai v. Athavale*, 5 Cr. L. J. 439; 10 Punj. Reg. 23, referred to. *SITAL PRASAD v. EMPEROR* (1915) I. L. R. 43 Calc. 591

Person within the local limits of the Magistrate's jurisdiction—Residence

—Commission of acts complained of within such local limits—Jurisdiction of Magistrate—*Criminal Procedure Code* (Act V of 1898), s. 110. Section 110 of the Criminal Procedure Code does not require residence within the local limits of the jurisdiction of the Magistrate who institutes proceedings thereunder. Where the habits of the persons called upon to furnish security for good behaviour were practised, and their evil reputation acquired, within the local limits of the jurisdiction of the Presidency Magistrate of the Northern Division of the town of Calcutta, though they might be occasionally residing elsewhere — Held, that the Magistrate was competent to take proceedings against such parties under s. 110 of the Code. *Ketabai v. Queen Empress* I. L. R. 27 Calc. 993, distinguished *Emraan v. Dina Halwai*, (1915) I. L. R. 43 Calc. ...

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Second Probate, duty on: See PROBATE
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good behaviour—Dissemination of matter likely to promote enmity or hatred between classes—Necessity of intention—*Criminal Procedure Code* (Act V of 1898), s. 105 (b)—*Penal Code* (Act XLV of 1860), s. 153A. To justify an order under s. 105 (b) of the Criminal Procedure Code, it is sufficient that the words used are likely to promote feelings of enmity or hatred between different classes and it is not necessary to establish an intention to promote such feelings as it would be on a trial for the offence under s. 153 A of the Penal Code. *Dhammala*

Previous convictions, proof of—Central Bureau register of thumb impressions, evidentiary value of—Extract from jail register without proof of identity—Locus pententia—*Criminal Procedure Code* (Act V of 1898) s. 110. Without proof of previous convictions no Court can take them into consideration. A register produced from

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the Central Bureau purporting to contain the thumb impression of the accused and his descriptive roll with a list of his previous convictions, when there was no evidence how it came to be made and lodged in the Central Bureau nor from what particulars the previous convictions were recorded and certified, was held insufficient proof of such convictions. An extract from the jail register showing previous convictions of a certain person with *aliases* and certified copies of previous convictions of the same in the absence of evidence of identity with the present accused, held insufficient to prove previous convictions of the latter. A person who has served the period of his imprisonment should be given a chance of reformation and should not be proceeded with under section 110 of the Criminal Procedure Code soon after his emergence from jail. *Junab Ali v. Emperor*, I. L. R. 31 Calc. 783, referred to. Although general statements of witnesses e.g., that the accused are all pick-pockets and that every one is afraid of them, may not be wholly inadmissible in evidence, no Court should act on a body of such evidence without testing the statements of the witnesses and obtaining from them some particulars of the facts on which their general statements are made. The case of each accused should be differentiated in the evidence and the order of the Court *Emperor v. Surikhi Amrit*, (1916) I. L. R. 43 Calc.

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Security to keep the Peace—Convict on under s. 143 of the Penal Code—Absence of finding of acts involving breach of the peace or evident intention of committing the same—Legality of order for security—Criminal Procedure Code (Act V of 1858) s. 106. To bring a case within the terms of s. 106 of the

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Criminal Procedure Code, the Magistrate should expressly find that the acts of the accused involved a breach of the peace or were done with the evident intention of committing the same, or at all events the evidence must be so clear that, without an express finding, a superior Court is satisfied that such was the case. *Jib Lal Gir v. Jagmohan Gir*, I. L. R. 26 Calc. 576, followed. A finding that the common object of the unlawful assembly was by means of criminal force or show thereof to take possession of land cultivated by a tenant of the rival landlord, and that, but for the direction of the latter to the tenants to retire, which was carried out, there might have been a serious riot, held insufficient to bring the case within the purview of s. 106 of the Code. *Abdul Ali Chowdhury v. EMPEROR*, (1915) I. L. R. 43 Calc. ...

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Separation, allegation of: See HINDU LAW—JOINT FAMILY 1031

Servants' Quarters, acquisition of: See LAND ACQUISITION 665

Set-off: See ATTORNEY'S LIEN FOR COSTS 932

Settlement Officer, order of: See SECOND APPEAL 603

— power of: See BENGAL TENANCY ACT (VIII OF 1885), s. 102 547

Shares, sale of: See DAMAGES 493

Simanadar—Chankidari Chakran Land Act (Beng. VI of 1870), s. 1, whether applicable—Bengal District Gazetteer, reference to by High Court The High Court is entitled to use the Bengal District Gazetteer as a book of reference. The Chankidari Chakran Land Act applies to simanadar, as the Gazetteer for Bankura shows that in that India (where the lands in suit are situated) the simanadar perform those duties which are

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described in section 1 of the Act.
LALU DOME & BEJOY CHAND MAHATMA, (1915) I. L. R. 43 Calc. 227

Single Judge, Judgment of: *See LETTERS PATENT APPEAL*

Solicitor's Lien for Costs: *See COSTS* ...

Sovereign Right: *See ASSESSMENT* ...

Special Constables—Dispute regarding ferry—Proceeding for security to keep the peace drawn up against one party—Appointment of members thereof as special constables—Refusal to act as such—Legality of appointment and of prosecution for such refusal—Police Act (V of 1861), ss. 17, 19. The only legitimate object of appointing special constables, under s. 17 of the Police Act (V of 1861), is to strengthen the ordinary police force by the addition of suitable persons. When the appointments are not made with such an object, a prosecution under s. 19 of the Act for refusal to act as such will not be permitted. When the members of one party to a ferry-dispute were appointed as special constables, and the circumstances showed that it was never really intended to utilize them as police officers, the High Court quashed the order of the District Magistrate directing their prosecution under s. 19 of the Act and the issue of warrants against them. **PARDIP SINGH & EMPEROR (1915) I. L. R. 43 Calc. 277**

Special Tribunal: *See RECORDS LOWER TO CALL FOR*

Specific Performance—Agreement to sell decree and rights appertaining thereto and to transfer it to defendant—Vendor and Purchaser—Decree becoming barred by limitation before assignment—Obligation to keep decree on vendor—Civil Procedure Code (Act XIV of 1852), s. 232—Transfer of decree. The plaintiffs (respondents) brought a suit for specific performance of an agreement made between them and

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the defendant (appellant) by which the latter contracted to purchase a mortgage decree and all rights appertaining thereto, which decree was to be duly transferred to the defendant, which by reason of section 232 of the Civil Procedure Code, 1852, could only be done by an assignment in writing. The decree, however, is *bona vacantia* because barred by limitation, and he refused to take it. Held (by setting the decision of the appellate High Court), that what the plaintiff had agreed to assign to the defendant was a decree capable of execution, that until assignment there was no obligation on the plaintiff as vendor to keep the decree, and that therefore when the decree became barred by limitation the plaintiff were asking for specific performance by the defendant of an agreement which they *were* themselves unable to perform, and no such relief could be granted. **Wolverhampton and Walsall Railway Co. v. L. & N.W. Railway Co., I. L. R. 45 (pp. 433), per Lord Beaumont, referred to in JAGINDRA SINGH BAWI & PEYPER DEEY DENT,** (1916) I. L. R. 43 Calc. 947

Contract to lend or borrow money till for balance of mortgage money & Damages—Provincial Small Causes Courts Act (IX of 1887), Sch. II, cl. 15, 16—Civil Procedure Code (Act V of 1888), s. 114, O. XL, r. 1. A suit for specific performance of a contract to lend or borrow money is not maintainable. **Rogers v. Challis, 27 H. 442, 175, **Sichel v. Rosenthal,** 39 H. 442, 371, **Larios v. Gentry,** 3. B. 4. P. C. 340, and **The South African Territories v. Wallington,** [1892] A. C. 309 followed. Not wanting suit to recover the balance of the mortgage money, or a sum for the rectification of the instrument recognisal by a Court of Equity Causes. (Rule clauses 15 and 16,**

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Schedule II, Provincial Small Cause Courts Act, 1887). But a suit for damages for breach of contract is cognizable by a Court of Small Causes, if the amount is within its pecuniary jurisdiction. *SHEIKH GALIM v. SARAJAN BIBI*, (1915) I. L. R. 43 Calc. ... 59

Specific Relief Act (1 of 1877), ss. 42:
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Stay of Proceedings: *See STAY OF SUIT*

Stay of Suit— Jurisdiction— Civil Procedure Code (Act V of 1908), s. 10—Stay of proceedings in one of two suits in respect of same subject-matter in different Courts.
A, who carried on business at Karachi and employed B. as his commission agent at Calcutta, instituted on 16th February 1915 in the Court of the Judicial Commissioner of Sind at Karachi, a suit against B. for an account and the recovery of whatever sum should be found due on the taking of such account. On 10th March 1915, B. instituted in the High Court at Calcutta the present suit against A. for the recovery of Rs. 26,665 or in the alternative an account. Thereupon, A. applied to have the present suit stayed pending the determination of his suit in the Karachi Court:—*Held*, that the only question that required consideration was whether the Karachi Court has jurisdiction to grant the reliefs claimed. The plaint in the Karachi suit sets out allegations that clearly give jurisdiction to that Court to try the case. The present suit must, therefore, be stayed till the determination of the suit at Karachi. *PADAMSEE NARAINJEE v. LAKHANSEE RAISSEE*, (1915) I. L. R. 43 Calc. ... 144

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Subrogation—Prior mortgage—Fraudulent suppression of, by vendor. If A purchases a property subject to three successive charges X, Y and Z with full knowledge of their existence, and retains a portion of the purchase money in his hands with a view to satisfy the mortgages Y and Z, but subsequently discharges the security Z, he cannot on satisfaction of the mortgage X use it as a shield against the mortgage Y. *Bisweswar Prosad v. Lala Sarbam Singh*, 6 C. L. J. 134, and *Hiam v. Vogel*, 69 Missouri 529, followed. But where the purchaser found on enquiry that there were only two subsisting charges Y and Z to be satisfied, but discovered after his purchase that there was a prior charge X which was falsely described as satisfied in the mortgage instrument of Y (in a suit upon bond X): *Held*, that from whatever point of view the case may be considered, the purchaser was entitled to 'priority in respect of the payment made by him to satisfy the first mortgage X. *Moresh Lal v. Mohant Baran Das*, I. L. R. 9 Calc 961; I. L. R. 10 I. A. 62, followed. *Held*, also, that the purchaser was not entitled to priority on the basis of the payment made by him to satisfy the second mortgage Y. *HAR SHYAM CHOWDHURI v. SHYAM LAL SAHU*, (1915) I. L. R. 43 Calc. ... 69

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— : *See WILL* ... 311, 312; *See WILL* ... 201

Succession Duty: *See PROBATE* ... 625

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order refusing to set aside ex parte decree—Civil Procedure Code (Act V of 1908), O. V, rr. 12, 17; O. IX, r. 13—Costs. For substituted service of summons to be effective, it is essential that the requirements of the rules of the Code should be strictly observed. Knowledge of the institution of the suit, derived by the defendant *alibi* is not sufficient in the absence of proper service of the summons. Where the serving officer on three separate occasions went to the place of business of the defendant's firm, under the erroneous belief that it was his ordinary place of residence, and asked for the defendant and, on not finding him, posted a copy of the writ of summons on the outer door of the premises:—*Held*, that this was not sufficient service. Proper enquiries and real and substantial effort should be made to find out when and where the defendant is likely to be found. *Cohen v. Nursing Dass Auddy*, 1 L. R. 19 Calc 201, followed. *KASSIM EBRAHIM SALLEJI v. JOHURMULL KHENKA*, (1915) 1 L. R. 43 Calc.

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Surety—Duty of Magistrate to inquire into fitness of each surety on evidence taken by him—Delegation of inquiry to the police or others—Rejection of sureties on a police report—Grounds of rejection—Want of control—Criminal Procedure Code (Act V of 1898), s. 122 Under section 122 of the Criminal Procedure Code, a Magistrate must personally hold a separate inquiry as to the fitness of each surety and decide the matter on evidence taken for the purpose, and he cannot delegate to a police officer or other person the function entrusted by law to him alone. *Suresh Chandra Basu v. Emperor*, 3 C. L. J. 575, *In re Abdul Khan*, 10 C. W. N. 1027, *Akbar Ali Mahomed v. Emperor*, 1 L. R. 42 Calc 206, and *Kalu Mirza v. Emperor*, 1 L.

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R. 37 Calc. 91, followed. *Queen-Empress v. Pirthi Pal Singh*, (1898) All. W. N. 151, *Emperor v. Tota, I. L. R. 25 All. 272, Emperor v. Ghulam Mustafa, I. L. R. 26 All. 371, Emperor v. Balicant, I. L. R. 27 All. 293, Bhauhani Singh v. King-Emperor, 12 All. L. J. 1004, King-Emporer v. Parmeshur, 1 Cr. L. J. 459, Ramanand Singh v. King-Emperor, 8 Cr. L. J. 344, *Jai Gobind v. Emperor*, 13 Cr. L. J. 760, King-Emperor v. Kaim Khan, (1906) Punj Reg. 18, *Emperor v. Mahro*, 10 Cr. L. J. 225, *Emperor v. Kamal*, 10 Cr. L. J. 230, *Emperor v. Allahdino*, 12 Cr. L. J. 410, *Emperor v. Haji Usman*, 11 Cr. L. J. 497, *Piru Abdulla v. Emperor*, 15 Cr. L. J. 378, *Muhammad Ibrahim v. Emperor*, 16 Cr. L. J. 100, approved. Want of sufficient control over the person bound down is not a valid ground for the rejection of a surety. *Kalu Mirza v. Emperor*, 1 L. R. 37 Calc. 91, *Siva Natha v. Emperor*, 16 Bom. L. R. 138, *Queen-Empress v. Rahim Balkh* 1 L. R. 20 All. 206, and *Sheikh Zeki v. Emperor*, 12 All. L. J. 785, referred to. *RAYAN KHAN v. EMPEROR*, (1916) 1 L. R. 43 Calc 1024*

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Schedule II, Provincial Small Cause Courts Act, 1887). But a suit for damages for breach of contract is cognisable by a Court of Small Causes, if the amount is within its pecuniary jurisdiction. *SHEIKH GALIM v. SAPARJAN BIBI*, (1915) I. L. R. 43 Calc. ... 59

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Subrogation—Prior mortgage—Fraudulent suppression of, by vendor. If A purchases a property subject to three successive charges X, Y and Z with full knowledge of their existence, and retains a portion of the purchase money in his hands with a view to satisfy the mortgages Y and Z, but subsequently discharges the security Z, he cannot on satisfaction of the mortgage X use it as a shield against the mortgage Y. *Bisencar Prosead v. Lala Sarwan Singh*, 6 C. L. J. 134, and *Hiam v. Vogel*, 69 Missouri 529, followed. But where the purchaser found on enquiry that there were only two subsisting charges Y and Z to be satisfied, but discovered after his purchase that there was a prior charge X which was falsely described as satisfied in the mortgage instrument of Y (in a suit upon bond X): *Held*, that from whatever point of view the case may be considered, the purchaser was entitled to priority in respect of the payment made by him to satisfy the first mortgage X. *Mohesh Lal v. Mohant Bacan Das*, I. L. R. 9 Calc 951; I. L. R. 10 I. A. 62, followed. *Held*, also, that the purchaser was not entitled to priority on the basis of the payment made by him to satisfy the second mortgage Y. *HAR SHYAM CHOWDHURI v. SHYAN LAL SANU*, (1915) I. L. R. 43 Calc. ... 69

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order refusing to set aside ex parte decree—Civil Procedure Code (Act V of 1905), O. V, rr. 12, 17; O. IX, r. 13—Costs. For substituted service of summons to be effective, it is essential that the requirements of the rules of the Code should be strictly observed. Knowledge of the institution of the suit, derived by the defendant *alibi*, is not sufficient in the absence of proper service of the summons. Where the serving officer on three separate occasions went to the place of business of the defendant's firm, under the erroneous belief that it was his ordinary place of residence, and asked for the defendant and, on not finding him, posted a copy of the writ of summons on the outer door of the premises.—*Held*, that this was not sufficient service. Proper enquiries and real and substantial effort should be made to find out when and where the defendant is likely to be found. *Cohen v. Nursing Dass Auddy*, I. L. R. 19 Calc. 201, followed. *Kashin Ebrahim Saleji v. Johnnery Klenka*, (1915) I. L. R. 43 Calc. 417

Surety—Duty of Magistrate to inquire into fitness of each surety or evidence taken by him—Delegation of inquiry to the police or others—Rejection of sureties on a police report—Grounds of rejection—Want of control—Criminal Procedure Code (Act V of 1898), s. 122 Under section 122 of the Criminal Procedure Code, a Magistrate must personally hold a separate inquiry as to the fitness of each surety and decide the matter on evidence taken for the purpose, and he cannot delegate to a police officer or other person the function entrusted by law to him alone. *Suresh Chandra Basu v. Emperor*, 3 C. L. J. 675, *In re Abdul Khan*, 10 C. W. N. 1027, *Altar Ali Mahomed v. Emperor*, I. L. R. 42 Calc. 706, and *Kalu Mirza v. Emperor*, I. L.

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R. 37 Cal. 91, followed. *Queen Empress v. Parka Pal Singh*, (1872) All. W. N. 154, *Emperor v. Teta, I. L. R. 25 All. 272, Emperor v. Ghulam Mustafa*, I. L. R. 26 All. 371, *Emperor v. Bilewant, I. L. R. 27 All. 223, Bhawani Singh v. King-Emperor*, 12 All. L. J. 1001, *King-Emperor v. Parmeshwar*, 1 Cr. L. J. 452, *Ramnand Singh v. King-Emperor*, 8 Cr. L. J. 314, *Jai Gobind v. Emperor*, 13 Cr. L. J. 760, *King-Emperor v. Kain Khan*, (1906) Punj. L. & 18, *Emperor v. Mahro*, 10 Cr. L. J. 225, *Emperor v. Kamal*, 10 Cr. L. J. 230, *Emperor v. Allahdino*, 12 Cr. L. J. 410, *Emperor v. Haji Usman*, 11 Cr. L. J. 497, *Pirn Abdulla v. Emperor*, 15 Cr. L. J. 374, *Muhammad Ibrahim v. Emperor*, 16 Cr. L. J. 109, approved. Want of sufficient control over the person bound down is not a valid ground for the rejection of surety. *Kalu Mirza v. Emperor*, I. L. R. 37 Calc. 91, *Sird Natha v. Emperor*, 16 Bom. L. R. 138, *Queen-Empress v. Rithim Balaksh*, I. L. R. 20 All. 206, and *Sheikh Zikri v. Emperor*, 12 All. L. J. 785, referred to. *Rasay Khan v. EMPEROR*, (1916) I. L. R. 43 Calc. 1024

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Unprofessional Conduct—*Pleader as li-
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legal proceedings to recover costs in
execution proceedings, incurred owing
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officer—*Legal Practitioners Act*
(XVIII of 1879) ss. 13 (b) and
14—*Anonymous communication*—
Contempt of Court. Where a pleader
who was a decree-holder in a certain suit associated himself with his co-decree-holder in a notice to the Munisif threatening legal proceedings to recover costs in an execution proceeding incurred owing to the negligence of the Court officers though the pleader did not sign the notice:—*Held*, that what was done by the pleader was done by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor, and it had no connection whatever with his professional character or anything done by him professionally, and that this case was not one within s. 13 (b) of the Legal Practitioners Act. *In re Wallace*, L.R. 1 P.C. 283. *In the matter of Jagendra Narayan Bose*, 5 C.W.N. 48, *In re a Pleader*, 18 Mad. L.J. 184, *In the matter of a first grade Pleader*, I.L.R. 24 Mad. 17, and *In the matter of Sarat Chandra Guha*, 4 C.W.N. 663, referred to. *In re POORNA CHANDRA ADDY*, (1915) 1 L.R. 43 Calc. 685

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Vakalatnama—*Practice*—*High Court*—
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Vakalatnama—contd.

Code (Act V of 1908), O. III, r. 4—*High Court General Rules and Circular Orders, 1910, Vol. I., Ch. XI, r. 45 (e).* It is not necessary that the acceptance of a *vakalatnama* should be in writing, but the High Court General Rules and Circular Orders, 1910, Vol. I., Ch. XI, r. 45 (e) should be fully complied with by the pleader who accepts the *vakalatnama*. *Per D. CHATTERJEA J.* An appearance or act by a pleader named in the *vakalatnama* (*without his accepting it in writing*) would, if allowed by the Court expressly or by implication, be valid and operative. The High Court rule, however, was made to be followed and is a salutary rule prescribed for safeguarding the interests of litigants and should certainly be followed in the mofussil in the manner indicated by the construction placed on the same in the answers to the several references made to this Court. It must be fully complied with by the pleader who first accepts the *vakalatnama* and all subsequent acceptances must be made by endorsements made in the presence of the Court, or the *Sheristadar*, or the Bench officer and dated, provided of course all the pleaders so accepting a *vakalatnama* are named in it. Courts in the mofussil must be specially careful in enforcing this rule in cases of compromise and withdrawal of cases and withdrawal of money and documents. *Per BEACONSFORT J.* There can be an acceptance by the pleader other than in writing. But if this Court has in the exercise of its powers, framed certain rules which must be observed by pleaders, a pleader who does not conform to those rules, ought not to be heard. *Quare:* Whether after the first endorsement by a pleader accepting a *vakalatnama* a mere endorsement of acceptance by those appearing on the strength of the original *vakalatnama*

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at subsequent stages of the case, is sufficient. *MANJU CHANDRA ADITYA v. PANCRU MEDALLI*, (1915) I. L. R. 43 Calc. 884

Valuable Consideration: *See LIMITATION* 34

Valuation of Suit—*Investigation as to amount or value of subject-matter of suit—Competence of Court of first instance to remit investigation of dispute to some other officer—Civil Procedure Code (Act V of 1908), O. XLV, r. 5—Practice.* Rule 5, Order XLV of the Code of Civil Procedure does not empower the Court of first instance, to remit the investigation as to amount or value of subject matter of suit to some other officer, it must be carried out by that Court. *HANSMAN JHA v. BAUJI JHA*, (1915) I. L. R. 43 Calc. 225

Vendor and Purchaser: *See SPECIFIC PERFORMANCE* 990

Verification of Plaintiff: *See EX PARTE DECREE* 1001

Waiver: *See SALE* 790

Wakf—*Mutacalls—Matters connected with wakf being religious matters—Descendant of the founder—Preferential claim to mutae il'iship—No right of inheritance—Qadi under the Mahomedan law exercising functions in relation to wakfs—His equivalent in the British Indian system of law—Position of the Subordinate Judge—District Judge, jurisdiction of.* Though a descendant of the founder of a wakf property has a preferential claim to the office of the mutacall, he does not become mutacall by right of inheritance but has to be appointed such by the Qadi who may supersede him if he is not so qualified. No right of inheritance attaches to a religious endowment. *Khajeh Salimullah v. Abu'l Khair M. Mustafa*, I. L. R. 37 Calc. 263, *Sayed Abiulla v. Sayyid Zain*, I. L. R. 13 Bom 555, *Brooknumud*

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Wakf—contd.

Sadik v. Moohummud Ali, 1 Mac. Sel. Rep. 22, and *Shahar Banoo v. Aga Mohamed*, L. R. 34 I. A. 46; I. L. R. 34 Calc. 118, followed. *Shama Charan v. Abdul Kabeer*, 3 C. W. N. 158, *In re Woozatunnessa Bibi*, I. L. R. 36 Calc. 21, *In re Halimi Khatun*, I. L. R. 37 Calc. 870, *Nimai Chand v. Golam Hossein*, I. L. R. 37 Calc. 179, *Muhammed v. Syed Ahamed*, 1 Bom. H. C. R. 18, *Jamal v. Jamal*, I. L. R. 1 Bom. 633, *Daud Sha v. Ismail Sha*, I. L. R. 3 Bom. 72, *Baba v. Nassaruddin*, I. L. R. 18 Bom. 103, *A.-G. v. Abdul Kadir*, I. L. R. 18 Bom. 401, *Kudratulla v. Mohini Mohan* 4 B. L. R. 134, *Muhammed v. Ahmed Bhai*, I. L. R. 25 Bom. 327, *Sayid Ali v. Ali Jan*, I. L. R. 35 All 98, *Muhammad Abdul Majid v. Ahmed Sied*, 11 All. L. J. 673, referred to. Under the Mahomedan law that Qadi alone was competent to exercise authority in respect of *wakfs* who was so expressly authorised in his letters patent. There was some difference of opinion upon the question whether such express authority was needed where a person was explicitly appointed the Chief Qadi; but even here the balance of opinion of jurists favours the view that power should be expressly conferred on the Chief Qadi to validate the administration of *wakfs* by him. There is also authority to show that the supreme authority in the State, by whom the Qadi is appointed, need not be a Mahomedan and although there is some divergence of opinion there is also authority to show that the

protection. As this is a matter regarding religious usages and institutions within the meaning of section 15 of Regulation IV of 1793, the rights of the parties must be determined with regard to the

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provisions of the Mahomedan law on the subject. It follows, accordingly, that a Subordinate Judge, who has not been expressly authorised by the Government to exercise functions in connection with the administration of *wakfs*, is not competent to act in that behalf. Whether a District Judge has implied authority to exercise the functions performed by a Qadi under the Mahomedan law is doubtful. In respect of *wakfs* which may be described as trusts created for public purposes of a religious nature within the meaning of subsection (1) of section 92 of the Civil Procedure Code, 1908, the District Judge may be assumed to have been authorised to discharge the functions of a Qadi. The real difficulty arises in the case of private *wakfs*. It is desirable that the Local Government should, to cover such cases, authorise either District Judges or Subordinate Judges or even judicial officers of a lower grade, if necessary, to exercise the functions of a Qadi. *ATIMANNESSA BIBI v. ABDUL SOBHAN*, (1915) I. L. R. 43 Calc. ...

Wakf, validity of—*Deference due to previous decision of High Court as authority—Res judicata—Mussalman Wakf Validating Act (V of 1913), title, preamble and s. 3, whether retrospective or prospective only—Privy Council decisions and pronouncements on Indian Legislature*. Where there had been a previous adjudication by the High Court on the invalidity of a certain *wakf* based on legal grounds (in a subsequent suit between the same parties):—*Held*, that (i) ordinarily that Court should feel bound, not on the principle of *res judicata* but out of the deference which was due to a previous decision of the High Court, to follow that authority; and (ii) that the previous conclusive decision had not been affected by the remedial operation of the

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Musselman Wakf Validating Act of 1913, which was not retrospective in effect but prospective only. *Rahimunissa Bibi v. Shaikh Manik Jan*, 19 C. W. N. 76, approved. It is doubtful whether the Governor-General in Council would make a legislative pronouncement that the repeated decisions of the Privy Council were erroneous, though from its knowledge of the requirements of the country the Legislature may think that in future the law should be otherwise administered. *Mahomed Buxth Majumdar v. Dewan Ajman Raja*, (1915) I. L. R. 43 Calc.

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— : **See HINDU LAW—ALIENATION BY WIDOW**

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— **Succession Act (X of 1865), ss. 311, 312—Demonstrative legacy—Interest, whether payable on a demonstrative legacy—Where no time for payment fixed by will, the time from which interest runs.** Where a testator had bequeathed legacies to several grandchildren named in the will to be paid from the sale proceeds of certain house property after the death of a daughter and the marriage of a grand daughter and it was contested that inasmuch as there is no specific provision in the Succession Act for the payment of interest on demonstrative legacies no interest was payable: Held, (a) that interest is payable upon demonstrative legacies; and (b)

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that where there is no time for payment fixed, although the amount is expressly made payable out of a particular fund, the case is governed by the principle laid down in *Lord v. Lord*, L. R. 2 Ch. App. 782; and s. 311 of the Succession Act applies. Also held that the rate of interest is 4 per cent. per annum. *Lord v. Lord*, L. R. 2 Ch. App. 782, *Chinnam Rajamannar v. Tadikonda Ramachandra Rao*, I. L. R. 29 Mad. 155, *Mullins v. Smith*, 1. Drew & Son. 204, and *In re Walford Kenyon v. Walford*, [1912] 1 Ch. 219, referred to and followed. ADMINISTRATOR-GENERAL OF BENGAL v. A D CHRISTIANA, (1915) I. L. R. 43 Calc.

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THE
INDIAN LAW REPORTS,
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APPELLATE CIVIL.

Jenkins C J, and N. R. Chatterjee J

KEDAR NATH BANERJEE

1915

June 1.

HARI DAS GHOSE.*

Hindu Law. Succession—Dayabhaga School—Whether great-grandfather's son's daughter's son or maternal uncle preferential heir—Stare decists.

In a Dayabhaga family the great-grandfather's son's daughter's son is entitled to succeed as heir in preference to the maternal uncle.

Kailash Chandra Adhikari v. Karuna Nath Choudhury (1) followed.

The principle of spiritual benefit regarding the succession in a Dayabhaga family laid down by the Full Bench in *Gooroo Gobind Shaha's Case* (2) cannot be questioned now.

SECOND Appeal by Kedar Nath Banerjee, the defendant No. 1.

The relationship of the parties will appear from

*Appeal from Appellate Decree, No. 1160 of 1913, against the decree of B. G. Bose, Subordinate Judge of Burdwan, dated Dec. 23, 1912, affirming the decree of Purna Chandra Bose, Munsif of Kalna, dated Sep. 12, 1911.

(1) (1913) 18 C. W. N. 477.

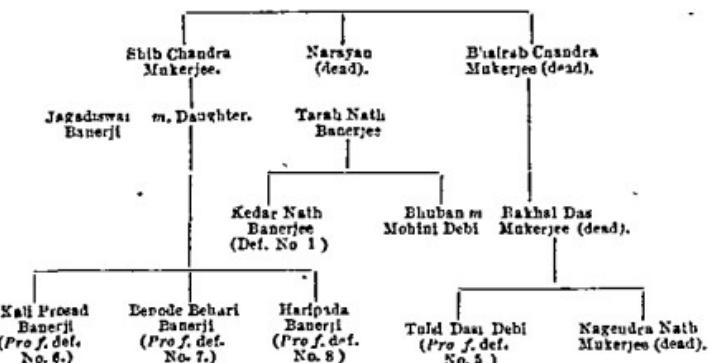
(2) (1910) 13 W. L. (F. B.) 49

5 B. L. R. 15.

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the following genealogical tree :—

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Plaintiff purchased the properties in suit in 1910 from the *pro forma* defendants Nos. 6, 7, 8, who are Nagendra Nath Mukerjee's great-grandfather's son's daughter's sons. After Nagendra Nath's death his mother Bhulan Mohini succeeded to the properties. After her death in 1900 the *pro forma* defendants Nos. 6, 7 and 8 have been in possession of the properties in suit. In 1910 the defendant No. 1, who is the maternal uncle of the late Nagendra Nath Mukerjee, took possession of the said properties dispossessing the plaintiff who, thereupon, brought this suit for declaration of title and recovery of possession. Both the Courts below held that the *pro forma* defendants Nos. 6, 7 and 8 being Nagendra Nath Mukerjee's great-grandfather's son's daughter's sons succeeded to the properties in suit in preference to the defendant No. 1, the maternal uncle, who then preferred this second appeal to the High Court urging that the maternal uncle was the preferential heir.

Babu Rishindra Nath Sarkar, for the appellant. As my learned leader Babu Golap Chandra Sarkar is too ill to attend Court, it now devolves on me to try and discuss the texts of Hindu law on this vexed

question of the position of the maternal uncle as heir. Two questions are raised in this appeal.

First, whether on the face of plaintiff's case, as stated in the plaint, he is entitled to any relief, for I say his suit is not maintainable.

Secondly, whether defendant No. 1 who is the maternal uncle is preferable as heir to the great-grandfather's son's daughter's son.

Shib Chandra is the brother of Bhairab Chandra, and Nagendra Nath Mookerjee the grandson of Bhairab was the last male owner.

[*Babu Nagendra Nath Ghose* (for respondent). In *Kailash Chundra Adhikari v. Karuna Nath Chowdhry* (1), a similar question was decided—Mr. Justice N. R. Chatterjea being a party to that decision. The point was never taken that the suit is not maintainable.]

But it arises all the same, and the suit ought to have been dismissed, because the property is in the enjoyment of Talsidas Debi who is legally entitled to maintenance out of the estate left by Nagendra, and so long as she is living—as they say the property was given to her for maintenance—the purchaser has purchased nothing. The property belongs to Nagendra and Tulsi is his widowed sister and Nagendra maintained his sister.

[N. R. CHATTERJEA J. Can that right be enforced? A married widowed sister is not entitled to maintenance: see *Mokhada Dassee v. Nundo Lall Haldar* (2), a decision of Maclean C. J. and two other Puisne Judges.]

I shall explain that ruling later. Now I shall deal with the second question, viz., of the maternal uncle being the preferential heir.

[N. R. CHATTERJEA J. In spite of the decision in

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Kailash Chandra Adhikari v. Karuna Nath Chowdhury (1), grandfather's brother's daughter's son is preferable to the maternal uncle as heir.]

I am trying to re-open the question only as regards the position of the maternal uncle.

[N. R. CHATTERJEA J. Is not this matter concluded by the Full Bench decision in *Gooroo Gobind Shaha v. Anund Lal Ghose* (2), though it may not be right?]

I respectfully submit that the Full Bench left open the question of preferential right.

The maternal uncle is a *bandhu*, *bhinna-gotra sapindas* are *bandhus*. Sister is not an heir under the Bengal school though sister's son is.

[N. R. CHATTERJEA J. We have to go by the *Dayabhaga* as interpreted the Full Bench decision in *Gooroo Gobind Shaha's Case* (2).

The principle is that this question should be finally decided and fixed. The House of Lords have held that when there is doubt as to a principle decided previously by a Bench consisting of two or more Judges the matter ought to be re-opened.

In *Kedar Nath Roy v. Anirita Lal Mookerjee* (3), Mookerjee J. declined to re-open the matter because it was not *res integra*. That the great-grandfather's son's daughter's son is an agnate is not expressly laid down in the *Dayabhaga*. The *Mitakshara* is the law in Bengal save and except when and as modified by the *Dayabhaga*. I rely on Chapter IX, section 6, paragraph 20 of the *Dayabhaga* and also on the *Dayatatwa* paragraphs 60—62 (*vldr* Golap Chandra Shastri's translation, 2nd Edition, page 74). Only the three ancestor's daughter's sons are mentioned as heirs.

(1) (1913) 18 C. W. N. 477.

(3) (1912) 16 C. L. J. 342, 348.

(2) (1870) 13 W. R. (F. B.) 49;

5 B. L. R. 15.

[*Babu Nogendra Nath Ghose.*: It is really a matter for the Legislature. Once Your Lordships decide to go into this question you must re-open the whole matter and upset all the Full Bench decisions.]

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[*JENKINS C.J.*: Your point is that the maternal uncle is named, but nowhere is the great-grandfather's son's daughter's son named.]

[*Yes; father's brother's daughter's son can, in some respects, be called a preferential heir in point of propinquity.*]

I can cite cases followed for 40 years which have been upset in Bombay and England.

See Dayabhaga (Colebrook's Translation, edited by G. C. Sarkar), Ch. XI, s. VI, paras. 20—26, 33, also the translation of Sree Krishna's Commentary, p. 192. These authorities were not placed before Mr. Justice Banerjee.

[*Golap Chandra Sastri's Hindu Law*, 4th Edition, p. 332, says "down to these." In *Dayatatwa*, p. 74, the author says that the list is exhaustive.

[*N. R. CHATTERJEA J.*: What does एतावत्सर्वंनेत्राणां mean in the passage एतां त्वयत्त ना धर्मिमोभ्यपिष्टुदातुणाममादे धनिरैयपिष्टुदातुणां भातामहमातुलादीर्णमधिकारः. तत्रापि प्रथमं भातामहस्तमादे सामुलसत्युक्त्वौवाणीं प्रसेष्याधिकारः? just referred to by you from Srikrishna's Gloss on the Dayabhaga?]

It means those heirs that are specifically mentioned by Jimutavahana, the author of the Dayabhaga.

[*N. R. CHATTERJEA J.*: But Colebrooke has translated the passage as "on the failure of all such kindred." "Such kindred" includes those that are held to be heirs by the Full Bench.]

The meaning of the passage is to be gathered not from a single word or passage but from the whole section which deals with the subject. Jimutavahana

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has specifically mentioned his list of heirs to be exhaustive.* In this connection your Lordships will be pleased to see Sarkar's Hindu Law, pages 322, 324 and 346, 359 and Dr. J. N. Bhattacharya's Hindu Law, pages 477, 487 of 2nd edition.

[N. R. CHATTERJEA J. Can you explain why these extra words "*as offer, etc.,*" are added ?]

Paragraphs 20 and 26 show that the list given in Dayabhaga is exhaustive. This translation of the Dayatatwa has been made after the Full Bench decision in *Digumber Roy Chowdhry v. Moti Lal Bundo-padhyā* (1). The author of the Dayabhaga did not contemplate that these relations would be added by the Full Bench.

So far as regards text-books. There are in addition several decisions of this Court.

[*Babu Nagendra Nath Ghose*. It cannot be said that the principle of propinquity supersedes the principle of *spiritual benefit*.]

According to principles of Hindu Law, the throwing of bones in the Ganges confers the greatest spiritual benefit.

[N. R. CHATTERJEA J. Offering *pinda* at Gaya (which can be done even by a co-villager) and throwing bones in the Ganges can be done *once* only, but the *Parban Sradh* is performed several times in the year.]

In *Gooroo Gobind Shaha's Case*(2) the question was whether the father's brother's daughter's son was an heir. But their Lordships, including Sir Barnes Peacock C. J. and Mitter J., kept open the question of priority.

[N. R. CHATTERJEA J. For nearly half a century this theory has been followed.]

*Dayabhaga, Ch. XI, Sec. VI, 20-26. (1) (1833) I. L. R. 9 Calc. 563.

(2) (1870) 13 W. R. (F. B.) 49.

But the Judicial Committee of the Privy Council, in spite of the principle of *stare decisis* which is also binding on it, set aside the adoption of an only son, in an appeal from the Madras High Court, and this is followed in Bombay where for forty years it had been otherwise. And your Lordships have the power to reconsider this question of the maternal uncle in a Full Court. I am told that the *vakil*, who appeared for the respondent in the Full Bench case of *Gooroo Gobind Shaha* (1) and conceded about the preferential position against the *sakulyas*, afterwards sat as a Judge in the subsequent Full Bench case of *Digumber Roy Chowdhry v. Moti Lal Bundo-padhyya* (2).

The principle of spiritual benefit has been held to be inapplicable to *stridhan* property. Regarding the powers of the Full Court and the binding effect of previous decisions or the principle of *stare decisis*, I refer to Halsbury's Laws of England, Vol. XVIII, para. 536, pages 211 and 212, also to *The Queen v. Edwards* (3), *Pearson v. Pearson* (4), *Mills v. Armstrong* (5), and recently in the case of *Kreglinger v. New Patagonia Meat & Cold Storage Co.* (6), Haldane, L. C. has modified the principle "once a mortgage always a mortgage" that has been followed for more than 100 years.

[*Babu Nogendra Nath Ghose*. What Shastri Golap Chaudra Sarkar overlooks is the fact that the daughter's sons have a place in the scheme of the Hindu family which at its foundation is agnatic, whereas the maternal uncle is a rank outsider. At present the spiritual theory works out an order of succession which is more in accord with the

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(1) (1870) 13 W. R. (F. B.) 49.

(2) (1883) 1 L. R. 9 C. 563.

(3) (1884) 13 Q. B. D. 586, 590.

(4) (1884) 27 Ch. D. 145, 154, 158.

(5) (1888) 1 L. R. 13 A. C. 1.

(6) [1914] A. C. 25.

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feelings of the people whatever reformers like Shastri Golap Chandra Sarkar have to say to the contrary for the principle he has been fighting for. Perhaps a time may come when the Hindus would require an alteration of the rule of succession to some other principle: but it is not yet. And when it does come, it will have to be settled by the Legislature as was done in England where ascendants could not inherit before the Act of 1833. But there the Judges did not upset the principle that real property could not devolve upwards though the ground alleged was the ridiculous one that water cannot flow upwards. The Legislature had to intervene].

For the view that the principle of spiritual benefit is not the only principle of succession, see the decision of Sale J. in *Toolsee Dass Seal v. Srimati Luckhymoney Dassee* (1).

In *Akshay Chandra Bhattacharya v. Hari Das Goswami* (2), Mitra J. sitting alone followed the principle of affinity and affection. After the Full Bench decision of *Goroo Govind Shaha v. Anuril Lal Ghose* (3) there was another case, viz., of *Kashee Mohun Roy v. Raj Gobind Chuckerbutty* (4) which was reversed by the later Full Bench decision in *Digumber Roy Chowdhury v. Moti Lal Bandopadhyaya* (5). Then in *Sorolah Dossee v. Bhoobun Mohun Neoghy* (6) and in *Braja Lal Sen v. Jiban Krishna Roy* (7) this principle has been doubted; and also in *Toolsee Dass Seal v. Luckhymoney Dassee* (8), *Dino Nath Mohunto v. Chundi Koch* (9), and *Kedar Nath Roy v. Amrit Lal Mookerjee* (10).

(1) (1900) 4 C. W. N. 743.

(6) (1888) I. L. R. 15 Calc. 292, 309.

(2) (1908) I. L. R. 35 Calc. 721, 726

(7) (1898) I. L. R. 26 Calc. 285

(3) (1870) 13 W. R. (F. B.) 49

(8) (1900) 4 C. W. N. 743.

(4) (1875) 21 W. R. 229.

(9) (1889) 16 C. L. J. 14, 17, 18.

(5) (1883) I. L. R. 9 Calc. 563.

(10) (1912) 16 C. L. J. 342, 348.

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The true test of succession ought to be nearness of blood as well as the doctrine laid down by the Full Bench, viz., the spiritual benefit.

[JENKINS C.J. The Privy Council followed certain works which had been characterised as forgeries in spite of that fact, simply because those works had been followed so long: see the case of *Bhagwan Singh* (1).]

The Full Bench in *Gooroo Gobind Shaha v. Anund Lall Ghose* (2) has not expressly laid down that the doctrine of spiritual benefit is the only principle. I am fortunate in that your Lordship Mr. Justice N. R. Chatterjea who decided the case of *Kailash Chundra Adhikari v. Karuna Nath Chowdhry* (3) is sitting on this Bench. This question affects every Hindu.

[N. R. CHATTERJEA J. It seems rather too late to object now.]

In the life of a nation 40 years is nothing.

[JENKINS C.J. The present rule was laid down by Mr. Justice Dwarkanath Mitter.]

I do not challenge his decision in the Full Bench case. He left the question of preferential heir open: see *Gooroo Gobind Shaha v. Anund Lall Ghose* (2).

[*Babu Noyendra Nath Ghose*. Regarding the Allahabad High Court decision on adoption in *Jai Singh Pal Singh v. Bijay Pal Singh* (4) in a recent case that went up to the Privy Council on appeal, viz., *Puttu Lal v. Parbati Kunwar* (5), the Subordinate Judge had refused to follow the Allahabad High Court decision and discussed the texts of Hindu Law, but was overruled by the Allahabad High Court

(1) (1899) I.L.R. 21 All. 412 419 (3) (1913) 18 C.W.N. 477.

L.R. 25 I.A. 173. (4) (1914) I.L.R. 27 All. 417.

(2) (1870) 13 W.R. (F.B.) 49 62 (5) (1915) 19 C.W.N. 811 817.

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whose decision was affirmed by the Judicial Committee of the Privy Council, who made strong remarks regarding the conduct of the Subordinate Judge; and that is a very strong argument in my favour.]

Further, I submit, the widowed childless daughter is entitled to maintenance from the estate devolving from her father, and the plaintiff purchased the property with knowledge that she was in possession as being entitled to maintenance: *see Sastri's Hindu Law*, 4th edition, p. 373.

Babu Nagendra Nath Ghose, for the respondent, was not called upon to reply.

JENKINS C.J. The point in contest in this litigation is whether in a Dayabhaga family the great-grandfather's son's daughter's son or the maternal uncle is to be preferred. The proposition only has to be stated to make one realize what an amount of learning and industry the problem might demand. We have had the advantage of having the position of the maternal uncle advocated before us by one who is worthily following in the steps of his distinguished father, and we can say, much as we regret the absence of Babu Golap, we do not feel we have suffered anything in view of the argument that has been addressed to us.

Undoubtedly there are, as Babu Rishindra Nath Sarkar has brought clearly to our notice, a number of considerations that might be brought into play were the matter untouched by authority. But a Full Bench of this Court [in *Gooroo Gobind Shah's Case* (1) as far back as 13 Weekly Reporter] came to a conclusion as to the principle of succession in a Dayabhaga family which governs this case. It has been treated as governing cases of a similar

(1) (1870) 13 W.R. (F.B.) 49; 5 B.L.R. 15.

description by other distinguished Judges whom I name in this particular connection merely because they are Judges who would be particularly familiar with and interested in the questions. The learned Judges are Mr. Justice Gurudas Banerjee (1), Mr. Justice Mookerjee (2) and Mr. Justice N. R. Chatterjea (3). And they one and all have felt that it is not for this Court, at any rate, to question the propriety of that Full Bench decision.

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In the case of *Kailash Chundra Adhikari v. Karuna Nath Chowdhry* (3), the contesting parties were in the precise position, curiously enough, of those who are now litigating before us, that is to say, the contest there was as here, between the great-grandfather's son's daughter's son and the maternal uncle. There it was decided in favour of the great-grandfather's son's daughter's son. And I see no ground on which we can refuse to follow that ruling. The learned vakil in the course of his argument before us has done his best to depreciate the value of the maxim *stare decisis*. But that is an argument that must be addressed to a higher authority and not to this Court.

There was another argument advanced before us namely, that the possession of Tulsi was such that her existence offers a complete bar to the suit. But that was a point not taken in the lower Courts, or in the original grounds of appeal here. It was a very late development. But obviously the basis of that argument involves an investigation into facts on which it is beyond our competence to embark. We cannot, therefore, give effect to it.

As to the first point, our decision, in obedience to the authorities, is that the plaintiff who claims under

(1) { (1-59) 16 C. L. J. 14

(2) (1912) 16 C. L. J. 342, 348.
(3) (1913) 18 C. W. N. 477.

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the great-grandfather's son's daughter's son is entitled to succeed. This is in accordance with the view of the learned Subordinate Judge and the Munsif.

The result is the appeal must be dismissed with costs.

N. R. CHATTERJEA J. I agree that the principle of succession governing this case must be taken to have been settled by the Full Bench decision in *Gooroo Gobind Shah v. Anund Lal Ghose* (1). The particular point raised in this case was decided in the case of *Kailash Chundra Adhikari v. Karuna Nath Chowdhry* (2), and I see no reason to alter the opinion which I expressed in that case.

G. S.

Appeal dismissed.

(1) (1870) 13 W. R. (F. B.) 49, (2) (1913) 18 C. W. N. 477.
5 B. L. R. 15.

CRIMINAL REVISION.

Before Flether and Beachcroft J.J.

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AND

CHHATRADHARI MISSER

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Joiner of Cases—Offences against different persons by the same accused—

Legality of joint trial—Criminal Procedure Code (Act V of 1898)

v. 234—Practice

Section 234 of the Criminal Procedure Code is not limited to the case of offences committed against the same person, but applies also where they are committed against different persons.

Mann Miya v. Empress (1) and *Sri Bhagwan Singh v. Emperor* (2) followed.

Empress v. Murari (3) *Nanda Kumar Sirkar v. Emperor* (4), *Ali Mahomed v. Emperor* (5) dissented from.

Queen-Empress v. Juala Prasad (6) referred to.

At the same time the powers under the section should be used with great care and caution where there are different complainants.

The facts relating to the two Rules are as follows:—

Crim. Revision No. 1863 of 1914. On the 29th September 1914, the petitioner Subedar Ahir, went to

* Criminal Revision, No. 1863 of 1914 against the order of R. Sheekhsukha, Sessions Judge of Mozaferpore, dated Nov. 11 1914 and Criminal Revision, No. 1902 of 1914, against the order of J. Johnston District Magistrate of Rajahmundry, dated Sept 2 1914.

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| (1) (1882) 1 L. R. 9 Cal. 371 | (4) (1897) 11 C. W. N. 322 |
| (2) (1898) 13 C. W. N. 517 | (5) (1908) 13 C. W. N. 419. |
| (3) (1881) 1 L. L. R. 4 All. 147 | (6) (1884) 1 L. L. R. 7 All. 174. |

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a cattle fair at Bettiah and got into conversation with one Saudagar Mollah, and pointing out a bullock, induced the latter to bid for it, on his behalf, up to Rs. 50, though it was not worth more than Rs. 32. He gave Sandagar one rupee as earnest money. The latter purchased the animal and paid the owner the rupee. The petitioner then offered to pay the balance but the owner, pretending to have had a quarrel with him, refused to accept the same, whereupon the petitioner prevailed upon Saudagar to pay Rs. 40, and requested the latter to accompany him with the bullock to his house where he promised to pay the amount. On the way the petitioner tried to run away but was arrested. In the meantime one Mahadeo Koer came up and identified the petitioner as the man who had also victimized him in a precisely similar manner shortly before. Mahadeo had been induced to purchase for the petitioner another bullock worth Rs. 22, for Rs. 44. Saudagar and Mahadeo lodged separate informations at the thana, and the petitioner was sent up by the police, on the 30th September, before the Joint Magistrate of Bettiah who tried him on two charges under s. 420 of the Penal Code of cheating the two informants respectively, and convicted and sentenced him, on the 15th October, for each offence, to imprisonment and fine. The petitioner's appeal against the order of conviction was dismissed by the Sessions Judge of Mozafferpore on the 9th November 1914.

Crim. Revision No. 1902 of 1914. On the 17th March 1914, the petitioner, Chhatradhari Misser, went with two others to the house of one Barkat Manjhi and carried him away forcibly, and proceeding next to the house of one Ganesh Lohar also seized him. The petitioner and his companions then took the two men to Rohanpur, in the district of Malda, wrongfully confined, and extorted bond from them. Barkat

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Babu Krishna Kumal Moitra, for complainant in Cr. Rev. No. 1902, referred to *Sri Bhagwan Singh v. Emperor* (1) as supporting his case.

Cur. adv. vult.

FLETCHER J. The only question raised in the hearing of these two Rules is whether section 231 of the Code of Criminal Procedure authorizes one trial of not more than three offences of the same kind committed within the space of 12 months when the offences have been committed against different persons. The judicial decisions on this question are not uniform. In the case of *Empress v. Murari* (2) it was laid down by the Court that "the combination of three offences of the same kind for the purpose of one trial can only be where they have been committed in respect of one and the same person and not against different prosecutors." A different view was taken by this Court in the case of *Manu Miya v. Empress* (3). The case of *Queen-Empress v. Juala Prasad* (4) the next authority in order of date, is not opposed to the decision in *Empress v. Murari* (2), for in the case of *Queen-Empress v. Juala Prasad* (4) the several sums that had been embezzled had become the property of the Government, and there was, therefore, only one complainant. The next case is *Nanda Kumar Sirkar v. Emperor* (5) to which decision I was a party. In that case, a similar view was taken to that expressed in the case of *Empress v. Murari* (2). That decision was followed in the case of *Ali Mahomed v. Emperor* (6) but dissented from in the case of *Sri Bhagwan Singh v. Emperor* (1).

(1) (1908) 19 C. W. N. 507.

(2) (1891) I. L. R. 4 All. 147.

(3) (1882) I. L. R. 9 Calc. 371.

(4) (1884) I. L. R. 7 All. 174.

(5) (1907) 11 C. W. N. 1128.

(6) (1908) 13 C. W. N. 418.

On a further consideration, I am of opinion that the decision in the case of *Nanda Kumar Sirkar v. Emperor* (1) cannot be supported. No doubt section 234 of the Code of Criminal Procedure is taken from section 5 of the Statute 24 & 25 Vict. c. 96. The words "against the same person" which appear in section 5 of 24 & 25 Vict. c. 96, do not appear in section 234 of the Code of Criminal Procedure.

Section 234 of the Code of Criminal Procedure, I think, is not limited to cases where the offences have been committed against the same person.

At the same time I think that the power given by section 234 is one that requires to be used with great care and caution where there are different complainants.

In the result, I think, these two Rules ought to be discharged.

BEACHCROFT J. The only question which arises in these two Rules is whether section 234 of the Code of Criminal Procedure is limited to a case where there is one complainant in respect of all the offences charged, or whether it applies where the complainants are different persons.

Looking to the plain words of section 234, I should hardly have thought the matter open to argument. Section 234 is one of the exceptions to the general rule contained in section 233, *viz.*, that every charge is to be tried separately. It provides that three charges of the same offence committed in the course of 12 months may be tried together, and the second part of the section explains what is meant by the same offence. Had the Legislature thought fit to impose such a limitation as that contended for on behalf of the petitioner, it would presumably have done so expressly, whereas

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the section is framed in the widest terms, and when the Legislature has imposed no limitation it is not for us to do so.

But there are cases in the Courts in which the view has been taken that the limitation contended for applies. It is not necessary to discuss the case of *Empress v. Murari* (1) to which reference was made in the Full Bench case of *Queen-Empress v. Juala Prasad* (2) from the report of which there is reason to suppose that one of the Judges who decided the earlier case had changed his views. But in the case of *Nanda Kumar Sirkar v. Emperor* (3) the opinion was expressed that section 234 "evidently refers to different acts done by the same individuals or same sets of individuals against the same complainant." In that case the earlier case of *Manu Miya v. Empress* (4) does not seem to have been brought to the notice of the learned Judges. The decision in that case was directly contrary to the view contended for on behalf of the petitioner. The Legislature in the Code of 1882 endorsed the view taken by the learned Judges by introducing an Explanation of what is to be understood by the phrase "offences of the same kind" and that Explanation is repeated in the present Code.

Three classes of cases constantly occur in the mafasil in which an accused is charged with offences of the same kind against different complainants. In one a man breaks into several houses in one night; in another a man whose house is searched for stolen property is found to have received property stolen from different persons, on different occasions; in the third a man cheats several persons in pursuance of a system, e.g., by pretending to have the power of doubling

(1) (1881) I. L. R. 4 All. 147

(3) (1907) 11 C. W. N. 1128.

(2) (1884) I. L. R. 7 All. 174

(4) (1832) I. L. R. 9 Calc. 371.

money. In the last mentioned case the joint trial might perhaps be defended on the ground that the offences were committed in the course of one transaction, without having recourse to section 234, but in the other cases the offences are not committed in the course of the same transaction. In these cases, where there is no fear of the accused being prejudiced, the charges are always tried together. In the whole of my experience as Magistrate and Sessions Judge, I do not remember objection ever having been raised to the accused being tried at one trial for three offences in such cases. Such an objection would have struck me with surprise, as I am sure it would almost all judicial officers in the mafassil, who have constantly to try cases in which the provisions of this section are applicable, especially when the view described in *Nanda Kumar Sirkar v. Emperor* (1) as evident, had been definitely rejected by two Judges of this Court so far back as 1882.

It may be that the decision arrived at in *Nanda Kumar Sirkar v. Emperor* (1) was correct in that there were three charges of rioting and three of hurt, and that such a case would not be covered by section 234. But, so far as that case decided that section 234 applies only to offences against the same complainant, I must express my dissent from it.

It is argued that, unless the section is limited in the way suggested, an accused might be much embarrassed by the joinder of charges, e.g., a man might be tried at one trial on three charges of murder committed on different occasions. Such an argument entirely loses sight of the fact that it must be presumed that those who are selected for the administration of the criminal law are fit for their duties, and will not use their powers in an arbitrary and oppressive manner.

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The Criminal Courts must be credited with the possession of a little common sense.

Finally, it was argued that other sections of the Code would be found difficult to work if the unrestricted interpretation were placed on section 234. The only section referred to was section 247. It was suggested that if one of three complainants were absent, the accused would be acquitted of all three charges. Leaving out of consideration for the moment the fact that charges are not drawn up in summons cases, the obvious answer is that he would not be acquitted of all three offences but only of the offence in respect of which the complainant was absent.

I think the Rules should be discharged, and the petitioner in revision case No. 1863 remanded to jail to serve out the remainder of his sentence.

E. H. M.

Rules discharged.

APPELLATE CIVIL.

Before Sharfuddin and Core JJ.

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Benami Purchaser—Auction sale—Civil Procedure Code (Act V of 1908) s. 66—Object of the section

Section 66 of the Code of Civil Procedure, 1908, lays down that no suit shall be maintained against any person claiming title under a purchase, certified by the Court, on the ground that the purchase was made on behalf of the plaintiff or some one through whom the plaintiff claims. The

* Appeal from Original Decree, No. 248 of 1911, against the decree of Prossana Kumar Gupta, Additional Subordinate Judge of Morafferper, dated May 31, 1910.

section is clearly aimed at *benami* purchases at execution sales. The clear intention of the section is to stop *benami* purchases by making it impossible for the real owner to question the *benamidar's* title.

Bishan Dial v. Ghazi-ud-din (1) referred to.

Sasti Churn Nundi v. Annipurna (2) doubted.

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APPEAL by Hanuman Pershad Thakur, the minor plaintiff, through his mother and next friend, Sheopiyari Thakurani.

The plaintiff brought the suit, out of which this appeal arose, for recovery of possession of the disputed properties, together with mesne profits, on the ground that the same constituted the property of his paternal aunt whose heir he was. According to the allegation of the plaintiff the disputed properties, on the death of his aunt, were taken possession of by Jadunandan Thakur, the defendant first party, in whose *farzī* name they were purchased by his aunt at an auction sale. The plaintiff also alleged that Jadunandan was an agent for and on behalf of his aunt. Shiah Thakur, the defendant second party, was, according to the allegation of the plaintiff, a *farzidar* of the defendant first party, in respect of a portion of the disputed properties.

The defendant first party contended, *inter alia*, that he was not the *farzidar* of plaintiff's aunt and that the disputed properties were purchased with his own money and that he had been in possession of the same ever since the purchase.

The defendant second party submitted that his purchase was *bona fide* and for valuable consideration.

Both the defendants pleaded that the plaintiff's suit was barred by the provisions of section 66 of the Code of Civil Procedure (Act V of 1908) and section 41 of the Transfer of Property Act (Act IV of 1882).

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The learned Subordinate Judge dismissed the plaintiff's suit.

Hence this appeal.

Mr. Casperz (with him *Babu Ganesh Dutt Singh*), for the appellant, submitted that two questions arose in this appeal : (i) the onus was on the defendants, since the defendant 1st party, stood in a fiduciary relation to the plaintiff's aunt. He must establish the *bond fides* of his purchase : see section 111 of the Evidence Act.

[*Coxe J.* But there is no question here of a transaction between the defendant 1st party, and the plaintiff's aunt. Your contention is that the purchase was a *farzi* one and you want to recover possession. The onus lies on you.]

(ii) The Calcutta case, *Sasti Churn Nundi v. Annopurna* (1) is applicable to the facts of the case.

[*Coxe J.* This ruling seems to be in your favour, but the question is—does it lay down good law? Section 66 of the Code of Civil Procedure seems to be against you, and we cannot go beyond the section.]

Section 41 of the Transfer of Property Act does not apply to the facts of this case. There is evidence to show that the defendant No. 1, holding, as he did, a general power of attorney, worked for his sister, the plaintiff's aunt, therefore, the defendant second party, ought to have enquired into the real state of affairs, and if he failed to do so, he did not act with reasonable care and good faith as the proviso to section 41 of the Transfer of Property Act requires.

[*Coxe J.* Do you mean to say that any purchaser should enquire as to whether his vendor has any relative, specially a lady, for whom he works ?]

No, I do not contend that but, I do submit that

there were sufficient materials to suggest to the defendant 2nd party the necessity of enquiring into the real state of affairs. The position of the defendant 2nd party, is no better than that of the defendant 1st party, because the former is merely a *farzidar* of the latter.

Babu Umakali Mookerjee (with him *Babu Lakshmi Narain Singh*), for the defendant 1st party, submitted that *Sasti Charan Nandi v. Annopurna* (1) was not applicable to the facts of this case. The facts of the present case are clearly distinguishable from those of that case. The Allahabad case, *Bishan Dial v. Ghazi-ud-din* is, indeed, applicable (2).

The plaintiff's case is barred by section 66 of the Code of Civil Procedure. Moreover, it has been proved, beyond a shadow of doubt, that it was with the money of the defendant No. 1, that the property was purchased, and that the defendant No. 1, has been in possession of the property: Therefore the plaintiff has failed in establishing that the transaction was a *benami* one.

Babu Badyanath Narayan Sinha, for the defendant 2nd party, submitted that the plaintiff was absolutely concluded by section 41 of the Transfer of Property Act so far as his claim against the defendant No. 2, was concerned. Plaintiff's own witnesses have proved that he has been in possession ever since the purchase and that, even, in the lifetime of the plaintiff's aunt. It is also proved that the defendant No. 1, has been in possession of the property ever since the purchase. The sale certificate is in his name. The name has been entered in the Land Registration Department and, it appears, in the partition proceedings. According to the plaintiff's own witnesses, rent receipts are granted by the defendant No. 1,

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and he produces receipts for payment of land revenue. It cannot therefore be contended that the defendant, 2nd party, did not take reasonable care in ascertaining the defendant 1st party's title, or that he did not act in good faith.

Mr. Caspersz. in reply.

Cur. adv. vult.

COXE J. This appeal arises out of a suit for recovery of possession of certain land that was sold in execution of a decree against one Harnandan Thakur in May 1900. It was purchased ostensibly by the defendant, Jadunandan Thakur. The plaintiff is the heir of one Rajbati, the sister of Jadunandan, and his case is that Jadunandan purchased the property with Rajbati's money and on her behalf, and that she remained in possession till her death in January 1906, since when the defendants are in possession. The second defendant is said to have purchased a portion of the property from Jadunandan in June 1904, in full knowledge that Jadunandan was merely a *farsidlar*. The defence is that Jadunandan bought the property himself.

The Subordinate Judge has dismissed the suit, holding that it is barred by section 66 of the Code and also that Jadunandan was the real purchaser. The plaintiff appeals.

Against Shiah Thakur, the 2nd defendant, the plaintiff has, in my opinion, no case whatever. There is no evidence worth a moment's consideration that Shiah had any reason to think that Jadunandan was not the real purchaser. Bhya Singh, an important witness for the plaintiff, admits that Shiah Thakur has been in possession since his purchase, which was 1½ years before Rajbati's death. Learned counsel contended that Rajbati, being a pardanashin, could not be estopped

from pleading that the ostensible owner was not the true owner, unless it was shown that everything had been explained to her. This seems to me an untenable contention. To accept it would be equivalent to holding that, though a purchaser is not bound to enquire whether his vendor is the *benamidar* for another man, he is bound to ascertain whether or not he is the *benamidar* of a woman. This is evidently unreasonable.

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As regards Jadunandan, I feel no hesitation in holding that the suit is barred by section 66 of the Code, and therefore need not examine the question whether Jadunandan was or was not the real purchaser. But I may say that I incline to the belief that the Subordinate Judge's view of the facts is correct. Learned counsel has subjected the defendant's case to powerful criticism, but clearly the whole burden of proof rests on the plaintiff. It is argued that there is a discrepancy between the defendant's pleading and his proof. In the first he asserts that he bought the property himself, whereas in his evidence he says that he obtained the money from his brother with whom he lives in commensality. This does not seem to me of very much importance especially when it is remembered that the defendant's case is that the sale certificate is conclusive. It is contended also that as Jadunandan was Rajbati's mukhtear, the burden of proving the good faith of all transactions between them rests on him. But it is open to doubt whether the power of attorney authorized Jadunandan to purchase property for Rajbati or to manage her estates, and in any case we have not to decide what was the character of a transaction between them; but whether there was any transaction between them or not. No real explanation has been given why Rajbati should want to buy this property which is

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many miles away from her home. It can hardly have been with a view to enrich the estate, because that had to descend to the plaintiff with whom she had quarrelled. The reason assigned in the evidence, namely, that she wanted to restore it to the judgment-debtor who was her kinsman, would have appealed with equal strength to her brother Jadunandan.

As I have said, however, the suit is, in my opinion, barred by section 66 of the Code, which lays down that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. Now, here the defendant certainly claims under a certified purchase, and the suit is based on the ground that the purchase was made on behalf of the plaintiff's predecessor in interest. Learned counsel contends that the plaintiff also sues on the ground that Rajbati remained in possession till her death and relies on the decision in *Sasti Churn Nundy v. Annopurna* (1) which certainly is in his favour.

If the decision quoted is correct, it makes a very serious inroad on the section, and, indeed, I do not think it would be going too far to say that, if it is accepted, the section is for all practical intents and purposes repealed. The section is clearly aimed at *benami* purchases at execution sales. We have no need of a specific provision of law that a suit against a real purchaser, based on a false allegation that he is a *benamidar*, must fail. The clear intention of the section is to stop *benami* purchases by making it impossible for the real owner to question the *benamidar's* title. It is sometimes said that the Legislature cannot have intended to enable fraud to be practised.

But I cannot attach any other meaning to the section than this, that it aims at discouraging *benamis* by rendering the real purchaser helpless, if he is cheated by his *benamidars*.

Now, if the view taken in the case cited above is correct, namely, that the real purchaser can base a suit against his *benamidar* on the fact of possession, it is evident that the section at once loses all its effect. The purchase being ex-hypothesi a *benami* purchase, the real purchaser would naturally get possession in every case, so that the only cases in which the section would be of any practical use would be those rare instances, in which the parties quarrel immediately even before possession is delivered. It can never have been the intention of the Legislature to enact the section for this limited purpose.

I agree with the decision in *Bishan Dial v. Ghazi-ud-din* (1). It is not necessary, however, to refer the decision in *Sasti Churn Nundi v. Annopurna* (2) to a Full Bench, because the present case can be distinguished, as the Trial Judge has pointed out, though it must be conceded that the distinction is somewhat unreal. Reading paragraph 7 of the plaint, it cannot be disputed that this suit was brought "on the ground that the purchase was made on behalf of someone through whom the plaintiff claims."

The appeal fails and must be dismissed with costs. The defendant No. 2 is entitled to separate costs.

SHARFUDDIN J. I agree.

S. K. B.

Appeal dismissed.

(1) (1901) I. L. R. 23 All. 175

(2) (1896) I. L. R. 23 Calc. 699.

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HANUMA
PRABH
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JADE
NANDAY
THAKUR
CIVIL J.

APPELLATE CIVIL.

Before Sharfuddin and Core JJ.

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March 12

PUNCHA THAKUR

v.

BINDESWARI THAKUR.*

Offerings to a Temple—Transferability—Transfer of Property Act (IV of 1882) s. 6, cl. (a).

There are certain rights that cannot be transferred. They are *res extra commercium*; for instance, sacerdotal office which belongs to the priest of a particular class. Similarly a right to receive offerings from pilgrims, resorting to a temple or shrine, is inalienable. The chance that future worshippers will give offerings is a mere possibility and as such it cannot be transferred.

Lakhsmanaswami Naidu v. Rangamma (1), *Kashi Chandra v. Kailash Chandra* (2) *Dinesh Nath Chuckerbutty v. Pratap Chandra Goswami* (3) referred to.

SECOND APPEAL by Pancha Thakur and another, the defendants.

The suit out of which this second appeal arises was instituted by the plaintiffs for recovery of possession of 3 annas share in the *charhawa* (offerings) made to the temple of Sri Bhairo Nath. The facts are shortly these. The plaintiffs and the defendant, third party, form members of a joint family. Out of the 16-annas offerings of Sri Bhairo Nath, an idol installed in a temple at Dekuli Khurd, the plaintiffs and the defendant third party, owned and possessed a 3 annas share

* Appeal from Appellate Decree, No. 3828 of 1912, against the decree of Jadunandan Prasad, Subordinate Judge of Mozafferpur, dated Oct. 7, 1912, confirming the decree of Moulvi Abdul Aziz, Munsif of Mozafferpur, dated June 29, 1912.

(1) (1902) I. L. R. 26 Mad. 31. (2) (1899) I. L. R. 26 Calc. 356.
(3) (1899) I. L. R. 27 Calc. 30, 32.

to the extent of which, it is alleged, they used to get *charhawa* offered by the people, from the time of their ancestors. On the 18th of January 1901, the defendant second party took delivery of possession through the Court in respect to the said 3 annas share by virtue of his purchase at auction sale held in execution of his decree and participated in the offerings to that extent. Thereafter, the defendants 1st party, by purchasing the aforesaid share from the defendant second party, commenced to exercise their own possession and to enjoy their share in the offerings. The plaint goes on to state that, on enquiry, it transpired that the defendant third party and Budaya Nath Thakur, father of the plaintiff No. 5, had executed a mortgage-bond with respect to the 3 annas share in the offerings in favour of the defendant second party, who enforced it and obtained a decree on it, in execution of which he sold and purchased the share in question at auction. It is urged in the plaint that the right in *charhawa* is an inalienable property, and so the father of the plaintiff No. 5 and the defendant third party, had no right to mortgage it, and that the defendant second party and his vendors acquired no valid title in it, the whole transaction from mortgage to sale being invalid. The plaintiff No. 2 is said to be insane. The suit appears to have been contested only by the defendants Nos. 1 and 2 of the first party, and the defendant second party whose defence is substantially the same. Their contentions are that there is no cause of action; that the suit, as framed, is not maintainable; that the court-fee paid is insufficient; that the suit is barred by limitation; that the right in *charhawa* is transferable; that the actual share which the plaintiffs and the defendant third party had in the offerings, was only 2 annas and sixteen gandas, one kora and no more; and that the mortgage decree and the sale held on it are binding on them.

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The learned Munsif found upon evidence that the plaintiffs' ancestors owned only a 2 annas, 16 gandas, 1 kora interest in the *charhawa* of the temple both as proprietors' and *moqurraridars*, and held that a right to receive such offerings was, indeed, inalienable. He found the other issues also in favour of the plaintiffs, and accordingly gave a modified decree in their favour and that of the defendant third party, jointly. The defendants Nos. 1 and 2 of the first party preferred an appeal to the Subordinate Judge who confirmed the judgment and the decree of the lower Court and dismissed the appeal with costs. Hence this second appeal.

Babu Baldeo Narain Singh and Babu Sahay Ram Bose, for the appellants.

Babu Asila Ranjan Chatterjee and Babu Gour Chandra Pal, for the respondent.

Cur. adv. vult.

SHARFUDDIN J. The suit, out of which this second appeal arises, was instituted by the plaintiffs for recovery of possession of 3 annas share in the offerings made to the temple of Sri Bhairo Nath on establishment of their title thereto. The plaintiffs and the defendant third party form a joint Hindu family. It is alleged that out of the 16 annas offerings, they owned and possessed 3 annas share and to that extent they used to get *charhawa* (offerings) offered by the people. The defendant second party, it appears, in execution of a decree put up that share to sale and himself purchased it. Thereafter, he sold it to the defendant first party. The defendant third party, father of plaintiffs Nos. 1 to 4, and the father of plaintiff No. 5, had executed a mortgage-bond with respect to the above share in favour of the defendant second party, and it was in execution of the mortgage decree

obtained on the strength of the above mortgage that the defendant No. 2 sold and purchased that share which he afterwards sold to the defendant first party.

In the plaint it is urged that the right in the share of the offerings is inalienable and so the father of the defendant No. 5 and the third party defendant, father of plaintiffs Nos. 1 to 4, had no right to mortgage it and that therefore the defendant second party, and his vendee, the defendant first party, acquired no valid title, as the whole transaction from mortgage to sale was invalid.

The suit was contested only by the defendants Nos. 1 and 2 of the first party and by the defendant No. 4 of the second party. Their contention is that the suit is barred by limitation and that the right in the offerings is transferable.

The first Court gave a modified decree in favour of the plaintiffs and the defendant third party, jointly. The defendants Nos. 1 and 2 of the first party therefore appealed to the lower Appellate Court which affirmed the judgment and decree of the first Court, and dismissed the appeal. The decree passed by the first Court, which was affirmed on appeal, is in the following terms—"That the suit be decreed modifiedly with full costs, that the plaintiffs' title be declared, that they jointly with the defendant third party, do recover possession over 2 annas, 16 gandas, and 1 kora share of *charhawa* interest, and that a permanent injunction be issued on the defendants first and second parties restraining them from receiving the *charhawa* offerings for the aforesaid share."

The defendants Nos. 1 and 2 now appeal to this Court.

Two grounds were urged on their behalf, first that of estoppel and, second, that the right to offerings was transferable.

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THAKER,
SAROGEND
J.

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THAKUR

The first question to be decided is whether such a right, as is claimed by the plaintiffs, is transferable or not.

BINDESWARI
THAKURSHABEEDDIN
J.

I am of opinion that such a right is not transferable. There are certain rights that cannot be transferred. They are termed *res extra commercium*; for instance, sacerdotal office which belongs to the priest of a particular temple. It was so held in *Lakshmanaswami Naidu v. Rangamma* (1). Similarly, a right to receive offerings from pilgrims resorting to a temple or shrine, is inalienable and no suit can be maintained for the recovery of *wasilat* in respect of properties derived from a turn of worship which from its very nature is voluntary. It was so held in the case of *Kashi Chandra Chuckerbutty v. Kailash Chandra Bandopadhyay* (2). Indeed, no man can compel another to make voluntary offerings. Offerings are, according to true significance, made to the deity of which the image is its visual symbol and their appropriation by the officiating priest is not a right in which he is entitled to traffic. This was held to be so in the case of *Dino Nath Chuckerbutty v. Pratap Chandra Goswami* (3).

A very strong reason has been given by the lower Appellate Court that such a right is not transferable. It says—"in the present case the duty of a *pujari* seems to have been assigned to Brahmans who make *pujas* to the idol Bhairo Nath. To my mind the performance of *puja* or *sheba* of the idol creates a right to receive the offerings made to it. If it be assumed for a moment that a right to receive offerings is alienable or transferable, then it is clear that an alienation of such right can be made even in favour of a Mahomedan or person of another caste who would

(1) (1902) I. L. R. 26 Mad. 31. (2) (1899) I. L. R. 26 Calc. 356.

(3) (1899) I. L. R. 27 Calc. 30, 32.

obviously be incompetent to perform the *pūja*." Offerings are voluntary presents to the deity to which, no doubt, the shebañt is entitled. They are nothing but voluntary payments. The income arising from them is uncertain and indefinite, and an income from such a right is not transferable under the Transfer of Property Act.

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J.

For the above reasons, I am of opinion that the mortgage of that right and the purchase of it in execution of the mortgage decree are invalid, and that the judgment of the lower Appellate Court cannot be assailed on that point.

It is somewhat difficult to reconcile the decree given with the character of the property which is clearly not transferable, but this point is not raised in the grounds of appeal and need not be considered.

As to estoppel, I think, the statutory provisions being against transfer, no question of estoppel can arise.

The appeal is dismissed with costs.

COXE J. I agree. It appears to me that the chance that future worshippers will give offerings to the temple is a mere possibility within the meaning of section 6, clause (*a*) of the Transfer of Property Act. Such a possibility cannot be transferred, and, in my opinion, this being a statutory provision, no question of estoppel can arise.

S. K. B.

Appeal dismissed.

APPELLATE CIVIL.

Before Fletcher and Teunon JJ.

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March 18.

RAMESWAR MALIA

v.

SRI SRI JIU THAKUR.*

Limitation—Valuable Consideration, what is—"Transfer," if a grant of permanent lease is—Suit to recover possession of property from lessee, if maintainable without making mortgagee of same property party—Limitation Acts (XV of 1877), s. 10, Sch. II, Art. 134; and (IX of 1908) ss. 10, 30, Sch. I, Art. 134.

In a suit by a *shebait* to recover possession of *debutter* property vested in the *shebait* in trust for the deity, which had been transferred more than 12 years before the institution of the suit by the plaintiff's predecessor in title, who had granted a *putni* lease of the property for consideration of a considerable fixed annual rent, but without receipt of any bonus:—

Held, that the suit was barred by limitation under Art. 134 of Sch. I of Act IX of 1908.

Abhiram Goswami v. Shyama Charan Nandi (1), *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* (2) and *Damodar Das v. Lakhman Das* (3) distinguished.

Held, further, that the grant of the permanent lease in this case was a transfer for valuable consideration.

Currie v. Misa (4) followed.

Held, also, that no period of limitation was prescribed for a suit of the present nature under the Act of 1877, and therefore s. 30 of the Act of 1908 has no application in this case.

Where in this case, the plaintiff had granted a valid ususfructuary mortgage of the property in suit to a third person for a term which

* Appeal from Original Decree, No. 7 of 1912, against the decree of Mohini Mohan Dutt, Subordinate Judge of Bankura, dated Sep. 21, 1911.

(1) (1909) I. L. R. 36 Calc. 1003 : (3) (1910) I. L. R. 37 Calc. 885 ;
L. R. 36 I. A. 148. L. R. 37 I. A. 147.

(2) (1911) I. L. R. 38 Calc. 526. (4) (1875) L. R. 10 Exch. 153,
L. R. 38 I. A. 76. 162.

did not expire before the institution of the suit, it is not open to him to determine the lease to the defendants, the benefit of which had been expressly assigned by the plaintiff to the mortgagee.

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APPEAL by the defendants. Kumar Rameswar Malia and others.

The suit out of which this appeal arose had been instituted by the plaintiff respondent, as the *shebait* of Sri Sri Keshab Rai Jiu Thakur, on the 8th August 1910, for setting aside a *putni* deed dated 11th May 1854, in favour of the predecessors of some of the defendants by one Lakshminacharyan Goswami, a predecessor of the plaintiff *shebait*. It was alleged in the plaint that the previous *shebait* had no authority to grant a permanent *putni* lease of the *debutter* property and that, therefore, the said lease was void and inoperative.

The defendants contended, *inter alia*, that the property was not an absolute *debutter* property, that the suit was barred by limitation and that the plaintiff having mortgaged the property in suit to the Raja of Pachete and possession being made over to the said Raja, the suit in ejectment was not maintainable before the expiry of the mortgage.

Notices to quit were served on the defendants on the 2nd September 1909, and by the notices the defendants were to quit possession on the 13th April 1910. The Raja of Pachete was in possession of the *putni mahals* since the 11th April 1910, as mortgagee and realized rent on the 16th November, 1910, i.e., after the institution of the present suit, for a period of six months from Baisakh to Aswin 1317 B.S.

The Subordinate Judge decreed the suit. Thereupon the defendants preferred this appeal.

Babu Bankim Chandra Mukerjee, for the appellants. The plaintiff having assigned his reversion in

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favour of the Raja of Pachete, cannot maintain a suit in ejectment. It is only the person entitled to the immediate reversion who can bring a suit in ejectment: see Transfer of Property Act, s. 109.

In the next place, the mortgagee in possession having accepted rent from the tenants has treated the lease as subsisting and there has been a waiver of the plaintiff's right to eject: Transfer of Property Act, s. 113. The fact that rent was received after the institution of the present suit, does not make any difference. Section 112 of the Transfer of Property Act expressly provides that rent realized after the institution of a suit does not operate as a waiver, but there is no such restriction provided for in section 113.

Moreover, there is a decree for mesne profits against the defendants. How can the plaintiff obtain mesne profits when the mortgagee is realizing rent?

In the third place, the suit is barred by limitation both under the provisions of the old law of limitation, Act XIV of 1859, also under the new law of 1908. Further, the plaintiff himself has received rent for more than 12 years prior to the institution of the suit. For the old law, see *Jagamba Goswamini v. Ram Chandra Goswami* (1) and *Madhu Sudan Mandal v. Radhika Prosad Das* (2). As regards the Act of 1908, I would rely upon article 134 of Schedule I as it now stands. The word 'purchase' has now been altered to 'transfer,' and so the article now contemplates all sorts of transfers.

The Subordinate Judge is wrong in holding that there was no valuable consideration for the transfer in this case as no bonus was paid. It is admitted that rent has been received for more than 60 years and rent is a valuable consideration: see the definition of 'lease' in section 105 of the Transfer of Property Act.

(1) (1903) I. L. R. 31 Calc. 314. (2) (1912) 16 C. L. J. 349.

Section 30 of the Limitation Act of 1908 does not apply as, according to the decisions of the Privy Council, no period of limitation was prescribed under the old Limitation Act of 1877. The new Limitation Act of 1908 was passed on the 7th August, 1908, but it did not come into operation till the 1st January, 1909. There was quite a long period during which any existing cause of action under the old law could have been sued. As the Act did not come into operation at once, any argument as to taking away vested right does not apply in the present case.

On the question of receipt of rent by the plaintiff, see *Ishan Chandra Mitter v. Raja Ramranjan Chakrabarty*(1) and *Maharajah Rajendur Kishnur Sing Bahadoor v. Sheopur sun Misser*(2).

In the last place, I submit that there is no absolute dedication in favour of the deity. The *chhar sanad* of the 30th June 1811 clearly indicates that proprietary interest in the properties was left in the grantee, subject to a charge in favour of the expenses of the deity. The numerous rent receipts granted by the grantees to the tenants were not granted as *shebaits* of the deity, but in their own name, and the property is described as *debutter*, which is equally consistent with a charge in favour of the deity.

Dr. Rashbehari Ghose (with him *Dr. Dwarkanath Mitra* and *Babu Bijay Kumar Bhattacharya*), for the plaintiff-respondent. The suit is not barred either under the old or the present law of limitation. Act XV of 1877 applies to the case. Section 30 of Act IX of 1908 provides that all suits for which the period of limitation provided for by the Act of 1908 is shorter than that provided by the Act of 1877, can be instituted within the period of 2 years next after

(1) (1903) 2 C. L. J. 125.

(2) (1866) 10 Moo. I. A. 438.

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the passing of the Act. Act XV of 1877 provided no period of limitation for such suits. Article 131 of that Act only applied to cases of absolute transfer and not to leases : *Abhiram Goswami v. Shyama Charan Nandi* (1) and *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* (2). Section 30 would apparently apply to a case where no period of limitation was prescribed as well as to a case where a longer period was provided for in the Act of 1877. Act IX of 1908 was passed on the 7th August, 1908. The 7th of August, 1910, was a Sunday. The suit was instituted the next day.

The suit is not barred under Act XIV of 1859. It was not pointed out in *Jagamba Goswamini v. Ram Chandra Goswami* (3) that Act XIV of 1859 did contain a provision similar to section 10 of Act IX of 1871 or Act XV of 1877. See section 5 of the Act of 1859. See also *Luteefun v. Bego Jan* (4) and *Khyroonissa v. Salehoonissa Khatoon* (5). The defendants are not *bona fide* transferees. They took the *putni* with notice of the trust.

The facts of the present case are exactly covered by the decision of the Judicial Committee in *Abhiram Goswami v. Shyama Charan Nandi* (1) and *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* (2). The case of *Madhu Sudan Mandal v. Radhika Prosad Das* (6), on which the other side has relied, follows the case in *Damodar Das v. Lakhman Das* (7) the facts of which are wholly distinguishable from the present case.

If the grant of the *putni* was a breach of duty

(1) (1909) I. L. R. 36 Cal., 1003 ;
L. R. 36 I. A. 148.

(4) (1866) 5 W. R. 120.

(2) (1911) I. L. R. 38 Cale. 526 ;
L. R. 38 I. A. 76.

(5) (1866) 5 W. R. 248.

(3) (1903) I. L. R. 31 Cale. 314.

(6) (1912) 16 C. L. J. 349.

L. R. 37 I. A. 147.

(7) (1910) I. L. R. 37 Cale. 885 ;

on the part of the *shebait*, as undoubtedly it was, receipt of rent under such a lease could create nothing more than a lease from year to year: *Maharanee Shibessouree Debia v. Mothooranath Acharjo* (1), *President and Governors of Magdalen Hospital v. Knotts* (2) and *Ecclesiastical Commissioners v. Merral* (3).

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The mortgage executed by the plaintiff in favour of the Raja of Pachete is a mortgage of the rents and profits of the property. The mortgage gives the Raja power to collect rents: *Juggeewundas Keeka Shah v. Ramdas Brijbookundas* (4).

If the lease is avoided, the Raja standing in the shoes of the mortgagor would be entitled to realize rents direct from the tenants on the land. It would be an accession to the mortgaged premises and the security of the mortgage would thus be enlarged. Further, I submit this is after all a question of defect of parties only. Your Lordships have the power to add the Raja as a party at any stage: see Civil Procedure Code, O. I., r. 10 (2). No suit ought to fail for want of parties.

If the plaintiff has no present right to possession and therefore to give notice to quit, the claim for khas possession may fail, but the plaintiff would be entitled to a declaration: *Goomanee Kazee v. Hurghur Mookerjee* (5) and *Kali Kishen Tagore v. Golam Ali* (6).

I submit, further, that there ought to have been an issue raised on the question as to whether the plaintiff could maintain the present action. The question was not raised by the present appellants.

The Raja could not waive notice given by the

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| (1) (1869) 13 Moo. I. A. 270; | (4) (1841) 2 Moo. I. A. 487; |
| 13 W. R. P. C. 18 | 6 W. R. P. C. 10, |
| (2) (1879) 4 App. Cas. 324 | (5) (1863) W. H. F. B. 115. |
| (3) (1869) L. R. 4 Exch. 162. | (6) (1886) I. L. R. 13 Calc. 3. |

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plaintiff. Further, the receipt for rent shews that the Raja merely accepted the rent as a "deposit." Prior to that the plaintiff served notice on the Raja not to receive rents.

The evidence on the record establishes beyond doubt that the properties were absolutely dedicated. The Subordinate Judge has exhaustively dealt with the question.

Babu Dwarkanath Chakrabarty, in reply.

Cur adv. vult.

FLETCHER J. This is an appeal by the defendants Nos. 9 and 13 against the judgment of the learned Subordinate Judge of Bankura, dated the 21st of September 1911.

The suit was brought by the plaintiff, an idol, through his *shebait*, to recover possession of the properties mentioned in the plaint on the ground that they formed part of the *debutter* estate of the idol and that a *patni* settlement, dated the 29th of Baisakh, 1261, granted by a former *shebait* in favour of the predecessors of the defendants Nos. 1 to 13, was invalid.

On the present appeal, it was not argued by the appellants that the idol had no interest in the properties in suit. Having regard to the evidence, which has been considered at great length by the learned Subordinate Judge, it is clear that the endowment is an ancient one. It was, however, argued before us, though somewhat faintly, that the properties were the private property of the *shebait* subject nevertheless to a charge for the maintenance of the worship of the idol. On the evidence before us, I think we can come to only one conclusion, namely, that there was an absolute dedication of the properties in favour of the idol.

The next question is, whether the present suit is barred by limitation.

The grant of a permanent lease without legal necessity was in excess of the powers of the *shebait* who granted the lease. The *shebait* who granted the lease died in the year 1859. Next came an infant who held the office until the year 1863. His adoptive mother then held the office for a few months and was succeeded by the father of the present *shebait*. The present *shebait's* father died on the 28th of July 1893 and since that date the present *shebait* has held the office. The rent has been duly paid.

Now, the question as to whether a suit of the present nature is barred after 12 years from the date of the permanent lease under article 134 of Schedule II of the Limitation Act (Act XV of 1877) has been considered in two judgments of the Privy Council in the cases of *Abhiram Goswami v. Shyama Charan Nandi* (1) and *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* (2). The facts in those two cases can not be distinguished from the facts in the present case. The view that the Privy Council took with regard to article 134 of the schedule II to the Act of 1877, was that the article only applied to the purchase of an absolute interest and not to the grant of a permanent lease. This view of the law was expressed in the case of *Abhiram Goswami v. Shyama Charan Nandi* (1). It is, however, to be noticed that the judgment in the case of *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* (2) was delivered by their Lordships after an application for a review of judgment (3). And in delivering their judgment their Lordships made the following remarks :—“The only

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(1) (1909) I. L. R. 36 Calc. 1003, (2) (1911) I. L. R. 38 Calc. 426,

L. R. 36 I. A. 148.

L. R. 38 I. A. 76.

(3) (1910) 14 C. W. N. cxliv.

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FLETCHER J. question remaining depends on the law of limitation. On this point attention has been called to the case of *Abhiram Goswami v. Shyama Charan Nandi* (1) decided by this Board in July 1909. It is impossible to distinguish that case from the present. Whatever might have been the inclination of their opinion if the matter had been *res integra* it seems to their Lordships that they would not be justified in reviewing on an *ex parte* application the considered judgment of the Board delivered after full argument. They will therefore simply follow the decision in *Abhiram Goswami v. Shyama Charan Nandi* (1). They do so with the less hesitation because the language of the article under discussion in that case and in this has been altered by subsequent legislation."

Another authority was also relied upon in the course of the argument. That authority was the decision by the Privy Council in the case of *Damodar Das v. Lakhn Das* (2). That decision did not, however, turn on article 134 of Schedule II to the Act of 1877. There was nothing in that case to show that the property was vested in the *chela* as trustee for the idol. Their Lordships found, agreeing with this Court, that the property belonged to the idol and that the possession of junior *chela* had become adverse to the idol.

So far as the evidence goes in this case, it appears that the property was vested in the *shebail* in trust for the idol. The original grant is not forthcoming but subsequent documents appear to have recognized it. The question of limitation must therefore be considered with reference to article 134 of Schedule I of the Limitation Act (Act IX of 1908). The wording of that article is as follows:—"To recover possession of immoveable property conveyed or bequeathed in

(1) (1909) I. L. R. 36 Calc. 1003; (2) (1910) I. L. R. 37 Calc. 885;

trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration." It will be noticed that the article in the present Act has been substantially altered from the article as it appeared in the Act of 1877. Presumably the word "transferred" was deliberately inserted in place of the word "purchased" in view of the decisions on the meaning of the word "purchased" in article 134, Schedule II of the Act of 1877.

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SRI SAI JIV

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The learned Subordinate Judge has found that the grant of a permanent lease was a "transfer." In that view I agree. He has, however, come to the conclusion that it was not a transfer for valuable consideration. In the opinion of the learned Judge a transfer for valuable consideration in a case such as the present could only take place when a fine or premium was paid for the grant of lease. The learned Judge also found that there was no proof that the premium was paid for the grant of the *patni* in the present case. It may, however, be doubted whether evidence of the actual payment of the premium could at this time be produced. But whether that be so or not, I think that a grant of a permanent lease at a considerable annual rent is a transfer for valuable consideration. As was remarked by the Exchequer Chamber in the case of *Currie v. Misa* (1), "a valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other."

In my opinion the grant of the permanent lease in the present case was a transfer for valuable consideration and the present suit is barred under article 134 of Schedule I to the Act of 1908, unless the plaintiff can bring his case under section 30 of the Act.

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The learned vakil for the respondent in the present appeal, however, based his main argument on this branch of the case not on the ground stated in the judgment of the learned Subordinate Judge, but on section 30 of the Limitation Act, 1908. But that section does not, in my opinion, apply. Section 30 only applies when there is a period of limitation "prescribed" both by the Act of 1877 and the Act of 1908. The decisions of the Privy Council show that no period of limitation was "prescribed" for a suit of the present nature under the Act of 1877.

The present suit is, I think, barred by limitation.

Another point that raises a difficulty in the way of the respondent is the usufructuary mortgage in favour of the Raja of Pachete. The respondent on the 8th of August 1909 granted to the Raja a usufructuary mortgage of (amongst other properties) the property in suit for a term that had not expired at the institution of the present suit. Whether that mortgage was binding on the idol, we do not know, the Raja not being a party to this suit. The mortgage is, however, expressed to be made for legal necessity and is treated by the learned Judge in his judgment as being a valid transaction. On the 9th of September 1909, notice to quit was served on the defendants. But on the 15th of November, 1910, that is after the institution of the present suit, the Raja received and granted a receipt for rent, part of which accrued due after the institution of the suit. In the absence of the Raja we cannot determine whether the mortgage to the Raja was a valid transaction, but assuming as the learned Judge did that the mortgage was valid, then it was not open to the *shebait* to determine without the Raja's consent the lease to the defendants the benefit of which had been expressly assigned by the *shebait* to the Raja in the usufructuary mortgage to him. Moreover

the receipt of rent by the Raja after the institution of the suit would seem to show that, at the date of the receipt, the Raja considered the lease as in existence. Further, under the terms of the decree, defendants are liable to pay mesne profits as from the date of the expiry of the notice to quit although they have paid rent to the Raja to a date subsequent to the institution of the present suit under an assignment of the rents to the Raja under the terms of a document executed by the *shebait* which the learned Judge treats as a valid transaction in his judgment. Clearly the Raja ought to have been made a party to the present suit, and if his usufructuary mortgage is a valid one then the defendants who have paid rent to him to a date subsequent to the suit, are not liable to ejectment.

I think we ought to reverse the decision of the learned Judge in the Court below and allow the present appeal. The plaintiff-respondent must pay to the appellants their costs both in this Court and the Court below.

The defendants Nos. 14 and 15, who are co-appellants with the defendants Nos. 9 and 13 in this appeal, have, it is represented, settled their disputes with the plaintiff. Their appeal is therefore allowed to be withdrawn.

TEUNON J. I agree.

S. M.

Appeal allowed.

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APPELLATE CIVIL.

Before N. R. Chatterjea and Mullik JJ.

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KHEMESH CHANDRA RAKSHIT

v.

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Sale for Arrears of Revenue—Purchaser of a share—Meaning of the words, “the purchaser shall not acquire any rights which were not possessed by the previous owner or owners”—Revenue Sale Law (Act XI of 1859) s. 54

At a sale under s. 13 of Act XI of 1859 it is not the rights of the recorded proprietor that pass, but the share itself.

The policy of the revenue law is to protect the revenue and make the share on which the revenue is assessed available for the arrears of revenue due upon it.

Debi Das Chordhuri v. Bipro Charan Ghosal (1) followed.

Banulata Dasi v. Monomothu Nath Goswami (2), *Kumar Kalanand Singh v. Syed Sarafat Hossein* (3), *Rahimuddi Muishi v. Nalini Kanta Lahiri* (4), *Bilas Chandra Mukerjee v. Akshoy Kumar Das* (5), *Bhairavi Koer v. Mathura Prasad* (6), *Annoda Prosad Ghose v. Rajendra Kumar Ghose* (7) and *Gungadeen Misser v. Kheeroo Mundal* (8) referred to.

SECOND APPEAL by Khemesh Chandra Rakshit, the defendant.

One Mofizar Rahaman was the owner of a share in a certain estate. On his death he left him surviving two sons, Fazar Rahaman and Dula Meah, a widow

* Appeals from Appellate Decree, No. 1419 of 1912, against the decree of Jagan Mohan Sarkar, Subordinate Judge of Chittagong, dated Feb 27, 1912, reversing the decree of Mohendia Nath Das, Munsif of Satkanya, dated Dec. 15, 1910.

(1) (1895) I. L. R. 22 Calc. 641 (5) (1912) 16 C. W. N. 587.

(2) (1907) 11 C. W. N. 821. (6) (1907) 7 C. L. J. 1.

(3) (1908) 12 C. W. N. 528 (7) (1901) I. L. R. 29 Calo. 223.

(4) (1909) 13 C. W. N. 407 (8) (1874) 14 B. L. R. 170,

and three daughters and these survivors became entitled under the Mahomedan Law to the deceased's estate in the proportion of one half share between the two sons and the other half share between the widow and the three daughters. On the 29th October, 1886, Fazar Rahaman for himself and as representing his brother, who was then a minor, caused his name to be registered as proprietor in the Collectorate with respect to the whole of their father's share to the exclusion of the female heirs. On the 21st March, 1893, the female heirs obtained an order for registration of their names in respect of a moiety of the estate left by Mafizar Rahaman. No steps were taken by any one to have the register corrected with the result that the shares of Fazar Rahaman and Dula Meah were respectively recorded as a half of the deceased's estate and the share of the female heirs was also recorded as a half of that estate.

On the 7th January, 1893, one Abdul Hamid Sikdar purchased the interest of Fazar Rahaman at a sale held in execution of a money decree and got his name registered with respect to the half share in the deceased's estate. Some time before 1895, Abdul Hamid Sikdar got a separate account opened in respect of the share he had purchased, with a proportionate Government revenue and it was called *hissya* No. 2. On the 25th March, 1897, the other half share of the deceased's estate, representing the interest of Dula Meah, was purchased by one Wasek Ali, who got his name registered with respect thereto. Subsequently, a second separate account was opened in respect of the shares of the female heirs of the deceased, together with that of Wasek Ali with a proportionate Government revenue and was known as *hissya* No. 5. Each of the *hissyas* Nos. 2 and 5 represented the half share of the estate left by the deceased and they were both

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sold for arrears of revenue under s. 13 of Act XI of 1859 on the 4th March, 1898. At the sale, *hissya* No. 2 was repurchased by Abdul Hamid Sikdar while *hissya* No. 5 became the property of one Khemesh Chandra Rakshit. In a suit brought by Abdul Hamid Sikdar against Khemesh Chandra Rakshit for a declaration that the plaintiff was entitled to a half share in the estate of Mafizar Rahaman and for a joint share in the rents of the lands forming that estate, the Munsif dismissed the plaintiff's claim; but it was subsequently decreed on appeal. The defendant, thereupon, appealed to the High Court.

Babu Mahendra Nath Roy (with him *Babu Dharendra Lal Kastgir* and *Babu Khitish Chandra Sen*), for the appellant. All that an auction purchaser could purchase at a revenue sale was the actual interest of the last owner and nothing more. By the terms of s. 54 of Act XI of 1859, the only interest that passed at a revenue sale was the interest which the registered person really had, subject to all encumbrances, and in no case did such a sale pass under that section a greater right than a recorded proprietor or his predecessor had at any time previously. See the case of *Annoda Prosad Ghose v Rajendra Kumar Ghosh* (1). As to how far adverse possession operated as an encumbrance, see *Rahimuddi Munshi v. Nalini Kanta Lahiri* (2) and *Bilas Chandra Mukerjee v. Akshoy Kumar Das* (3). The plaintiff was, therefore, entitled to a moiety of the half share of the deceased's estate as representing his interest prior to his repurchase at the revenue sale, while the other moiety of that share as representing the interest of the plaintiff's brother, together with the interest of the

(1) (1901) I. L. R. 29 Calc. 223. (2) (1909) 13 C. W. N. 407.

(3) (1912) 16 C. W. N. 587.

plaintiff's mother and sister, was purchased by the defendant.

Babu Jogesh Chandra Roy (with him *Babu Prabodh Coomar Das*), for the respondent. A revenue sale passed to the purchaser the right in the exact share in respect of which the separate account was opened and not the interest of the particular sharer. Therefore, in deciding what right a purchaser at a revenue sale took in the separate share sold, it was necessary to look to the recorded share only, in respect of which the account was opened and a proportionate revenue was paid, and not to the right, title and interest of the particular person in whose name the account was opened. See *Gungadeen Misser v. Kheeroo Mundal* (1), *Debi Das, Chowdhuri v. Bipra Charan Ghosal* (2) and *Banalata Dasi v. Monmota Nath Goswami* (3).

Even the cases of adverse possession recognised that only the recorded share passed, see *Rahimuddi Munshi v. Nalini Kanta Lahiri* (4), *Kumar Kalanand Singh v. Syed Sarafat Hossain* (5), *Bilas Chandra Mukerjee v. Akshoy Kumar Das* (6), *Bhawani Koer v. Mathura Prasad* (7) and *Khobhari Singh v. Ram Prosad Roy* (8). The case of *Chowdhry Jogessur Mullick v. Khetter Mohun Pal* (9) did not apply. The question of fraud did not arise and on the admitted facts of the case there could not be any fraud, see *Doorga Singh v. Sheo Pershad Singh* (10). All that could be said was that the Collector made a mistake in his record.

Babu Mahendra Nath Roy, in reply. The expression "previous owner or owners" in s. 54 of Act

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| (1) (1874) 14 B. L. R. 170. | (6) (1912) 16 C. W. N. 587 |
| (2) (1895) I. L. R. 22 Calc. 641. | (7) (1907) 7 C. L. J. 1. |
| (3) (1907) 11 C. W. N. 821 | (8) (1907) 7 C. L. J. 387. |
| (4) (1909) 13 C. W. N. 407. | (9) (1889) I. L. R. 17 Calc. 148. |
| (5) (1909) 12 C. W. N. 528. | (10) (1889) I. L. R. 16 Calc. 194. |

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XI of 1859 meant previous owner or owners at any time. The question involved was not so simple. The words of the section undoubtedly set the purchaser on his enquiry as to in whose name the account was opened. The cases of *Anmoda Prosad Ghose v. Rajendra Kumar Ghose* (1) and *Banalata Dasi v. Monmota Nath Goswami* (2) were relied on. In *Bhawani Koer v. Mathura Prasad* (3) reference was made to the judgment of Rampini J., in *Anmoda Prosad Ghose v. Rajendra Kumar Ghose* (4) and that judgment was followed. See also *Musammat Bhawani Kumar v. Mathura Prasad Singh* (5). The case of *Gungadeen Misser v. Kheeroo Mundul* (6) had nothing to do with s. 54, while the cases of *Kumar Kalanand Singh v. Syed Sarafut Hossein* (7) and *Rahimuddi Munshi v. Nalini Kanta Lahiri* (8) dealt with encumbrances. Furthermore, the Collector was bound to see that the account, which was opened by the plaintiff under sections 10 and 11 of Act XI of 1859 in respect of his share in the estate, was opened only for the share corresponding with the character and extent of interest in the estate, in respect of which the plaintiff was recorded as proprietor under the Land Registration Act, 1876: see section 69 of that Act. Such errors and mistakes as there might be in the record, must be rectified at the time the account was opened.

Babu Dharendra Lal Kastgir, in reply, supported the above contentions and added that the finding of the Subordinate Judge that no question of fraud arose was erroneous, and that the Subordinate Judge ought to have dealt with the finding of the Mansif on this point.

Cur. adv. vult.

(1) (1901) I. L. R. 29 Calc. 223.

(2) (1907) 11 C. W. N. 821.

(3) (1907) 7 C. L. J. 1.

(4) (1911) I. L. R. 29 Calc. 223.

(5) (1912) 16 C. W. N. 985.

(6) (1874) 14 B. L. R. 170.

(7) (1908) 12 C. W. N. 528.

(8) (1909) 18 C. W. N. 407.

N. R. CHATTERJEE AND MULLICK JJ. The question for decision in this appeal is what is the extent of share which passed to the plaintiff, at a sale held under section 13 of Act XI of 1859?

It appears that a 14 annas 9 pies share of an estate belonged to one Mofizar Rahaman.

Mofizar Rahaman died, leaving two sons, Fazar Rahaman and Dula Meah, a widow and three daughters. Under the Muhammadan Law the two sons got one-half (a quarter each) and the widow and the daughters the other half of the estate. On the 29th October, 1886, Fazar Rahaman got himself and his brother Dula Meah, who was then a minor, registered in the Collectorate with respect to the whole of the 14 annas 9 pies share ignoring his mother and sisters who may be conveniently referred to as the females.

These females, however, on the 21st March 1893 obtained an order for registration of their names in respect of one-half of 14 annas 9 pies share, that being their shares in the estate left by Mofizar Rahaman.

On the 7th June 1893, the plaintiff purchased the interest of Fazar Rahaman at a sale held in execution of a money decree and got himself registered with respect to 7 annas 4½ pies share, although that share included the share of Dula Meah. On the 25th March, 1897, the share of Dula Meah was purchased by one Wasek Ali, and he also got his name registered with respect to 7 annas 4½ pies share although Dula Meah's share was only one-half of that.

Now after the females got their names registered with respect to 7 annas 4½ pies share, Wasek Ali as purchaser of Dula Meah's interest ought to have been recorded as owner of one-half of 7 annas 4½ pies share, and the share registered in the name of the plaintiff also ought to have been reduced to one-half of 7 annas 4½ pies share. In the general Register, however, the

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females were recorded as owners of 7 annas 4½ pies share and Wasek Ali and the plaintiffs were recorded as owners of 7 annas 4½ pies each. The total, therefore, (treating the 14 annas 9 pies as 16 annas) amounted to 24 annas.

It appears that some time before 1895, the plaintiff got a separate account opened in respect of 7 annas 4½ pies share with a proportionate Government revenue and it was called *hissya* No. 2.

The shares of the females together with that of Wasek Ali (purchaser of Dula Meah's interest) were formed into a separate account consisting of 7 annas 4½ pies share with a proportionate Government revenue and was known as *hissya* No. 5.

Both the *hissyas* Nos. 2 and 5 were sold for arrears of revenue under section 13 of Act XI of 1859, on the 4th March 1898, and *hissya* No. 2 (which formerly belonged to him) was purchased by the plaintiff, and *hissya* No. 5 was purchased by the defendant.

It appears from the judgment of the Court below, that a person claiming the interest of the females in the estate has lost his suit as against the plaintiff and the defendant, by reason of these sales for arrears of revenue. We are not, therefore, concerned with the shares of the females, and the only question now is, whether the plaintiff by his purchase of *hissya* No. 2 acquired only one-half of 7 annas 4½ pies share (that being the share which originally belonged to Fazar Rahaman and subsequently to the plaintiff under his purchase in execution of the money decree) or the entire 7 annas 4½ pies share covered by separate account No. 2.

The question turns upon the construction of section 54 of Act XI of 1859 which runs as follows:—“Where a share or shares of an estate may be sold under section 13 or section 14, the purchaser shall

acquire the share or shares subject to all incumbrances and shall not acquire any rights which were not possessed by the previous owner or owners."

It is contended on behalf of the appellant that the words "shall not acquire any rights which were not possessed by the previous owner or owners" mean that the purchaser shall not acquire any rights which were not possessed by the previous owner at any time previously, and that as Fazar Rahaman or the plaintiff never possessed more than a moiety of 7 annas 4½ pies share, the plaintiff as purchaser at the revenue sale could not acquire a title to more than that share. On the other hand, it is contended on behalf of the respondents, that the purchaser acquires the share itself which is put up for sale, irrespective of the extent of the share of the person whose name was recorded in the separate account.

The rights of the purchaser, under section 54 of Act XI of 1859, have been considered in several cases by this Court. In *Debi Das Chowdhuri v. Bipro Charan Ghosal* (1), where an estate held by a Hindu widow was sold for arrears of revenue, and it was contended that under section 54, the purchaser did not purchase any estate which lasted longer than her lifetime, Pigot J. after referring to the provisions of section 13 observed: "It is plain that as the result of a sale under section 13 it is contemplated that the whole share in respect of which the arrear may have been due shall pass to the purchaser; and that confirms the impression which, upon reading section 54 alone, one would be disposed to form with regard to its meaning that the words 'shall not acquire any rights,' in that section refer to the acquisition of rights in respect of interest, such as incumbrances or the like, which are referred to in the previous phrase

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of that section. We are therefore of opinion that the entire share passed upon the sale for arrears of revenue under section 54 and that the purchaser did not take any interest limited to the life of Satamani." No doubt a Hindu widow in possession of a share of an estate as the heiress of her husband, or her father represents the full owner's interest, and the purchaser of such a share acquires the share itself, and not merely a life-estate and this is the ground upon which Brett and Sharfuddin JJ. based their decision in *Banalata Dasi v. Monmotha Nath Goswami* (1). Pigot and Stevens JJ., however, in the case cited above based their judgment upon a construction of the section and held that the words "shall not acquire any rights which were not possessed by the previous owner or owners" refer to the acquisition of rights in respect of interest such as incumbrances or the like which are referred to in the previous phrase.

It has also been held that adverse possession against the defaulter whether for the statutory period or for a lesser period does not bind the purchaser of a share, and that the purchaser is not a person claiming from or through the defaulter; see *Kumar Kalanand Singh v. Syed Strafat Hossein* (2), *Rahimuddi Munshi v. Nalini Kanta Lahiri* (3) and *Bilas Chandra Mukerjee v. Akshoy Kumar Das* (4). See also *Bhawani Koer v. Mathura Prasad* (5).

These authorities clearly show that at a sale under section 18 of Act XI of 1859 it is not the rights of the recorded proprietor that pass, but the share itself.

Reliance was placed on behalf of the appellants on the case of *Ananda Prosad Ghose v. Rajendra*

(1) (1907) 11 C. W. N. 821.

(3) (1909) 13 C. W. N. 407.

(2) (1909) 12 C. W. N. 528.

(4) (1912) 16 C. W. N. 587.

(5) (1907) 7 C. L. J. 1.

Kumar Ghose (1). In that case, the plaintiff who purchased in execution of a money decree, the rights of the defaulter in whose name a separate account had been opened in respect of a share of an estate, sued for declaration of his title to, and recovery of possession of the share, against the purchaser thereof at a revenue sale, and it was contended on his behalf that the words "the purchaser shall not acquire any rights which were not possessed by the previous owner or owners" mean that the purchaser at a revenue sale only acquires the rights possessed by the previous owner or owners *at the date of the sale*. Such a contention if upheld, would lead to the result that if the previous owner parts with all his rights before the share is put up for sale for arrears of revenue the purchaser at such a sale acquires nothing and the learned Judges (Rampini and Pratt J.J.) overruled the contention. In doing so, however, they held that the words quoted above meant that "the purchaser shall not acquire any rights not possessed by the previous owner or owners at sometime or another." It is upon this passage of the judgment that the appellant relies, and it is contended that as the previous owner of *hissya* No. 2 never had rights to anything more than one-half of the 7 as. 4½ pies share, the plaintiff could not by his purchase of *hissya* No. 2, acquire a title to the entire 7 as. 4½ pies share. No doubt there is the passage in the judgment, but then the learned Judges also said with reference to the interpretation sought to be placed upon the section, "To put such an interpretation upon these words would be to entirely ignore the policy of the revenue law which is to protect the revenue and make the share, on which the revenue is assessed, available for the arrears of revenue due upon it," and they quoted

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with approval the observations of Phear J. in the case of *Gangadeen Misser v. Kheeroo Mundul* (1). "The sale of the Collector passes to the purchaser the share of the defaulting shareholder of the entire estate, as it was registered in the Collector's book" and "it was not the intention, we think, of the Legislature to introduce uncertainty of this kind into auction-sales held for the purpose of realizing revenue. On the contrary, it is rather the general principle of the Legislature to make these sales effective to pass the full share of the defaulting shareholder, free, so to speak, of all incumbrances."

In none of the cases which we have referred to, was there any question of the extent of the share which belonged to the person in whose name the separate account of the share of the estate was opened, but these authorities establish the proposition that it is not the right, title and interest of the previous owner of the share which pass to the purchaser under section 54, but the share as recorded in the Collector's book, on which the revenue is assessed. It is true Phear J. refers to "the full share of the defaulting shareholder." In the present case although Fazar Rahaman and subsequently the plaintiff as purchaser of his interest had only a moiety of 7 annas $4\frac{1}{2}$ pies, the separate account was opened with respect to the whole 7 annas $4\frac{1}{2}$ pies share in the name of the plaintiff with a proportionate Government revenue. The other moiety belonged to Dula Meah, and the name of Wasek Ali, the purchaser of his interest, ought to have been recorded in that separate account, but was entered in the separate account No. 5 along with the names of the females. But the 7 annas $4\frac{1}{2}$ pies share was formed into the separate account No. 2 with a proportionate Government revenue, and not

with a moiety of the revenue payable for the share. And if the policy of the revenue law is to protect the revenue and make the share on which the revenue is assessed available for the arrears of revenue assessed upon it, as we think it is, the whole of the 7 annas 4½ pies share when it fell into arrears, became liable to be sold for such arrears, although the person recorded as the owner of that share had a right to only a moiety of it.

We agree with the view taken by Pigot J. in *Debi Das Chowdhuri v. Bipro Charan Ghosal*(1) followed by Mookerjee J. in *Bhawani Koer v. Mathura Prasad*(2), *viz.*, that the words "shall not acquire any rights" in section 54 refer to the acquisition of rights in respect of interest such as incumbrances or the like which are referred to in the previous phrase of that section.

It is to be observed that a separate account is opened under Act XI of 1859 after service of notice to the other shareholders. It is pointed out, however, on behalf of the appellant that section 69 of the Land Registration Act provides that no separate account shall be opened under the provisions of sections 10 or 11 of Act XI of 1859 in respect of the share of any applicant under the said sections otherwise than for a share corresponding with the character and extent of interest in the estate in respect of which such applicant is recorded as proprietor or manager under the Land Registration Act, and that, therefore, his *share* ought not to have been opened with respect to 7 annas 4½ pies share in the name of the plaintiff who applied for opening of separate account of his share. But as already stated, in the general registry the plaintiff was registered with respect to 7 annas 4½ pies; Wasek Ali and the females also were

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each with respect to a similar share, the total shares thus amounting to more than 16 annas. That, no doubt, was a mistake, but the separate accounts were opened several years before the *hissyas* were put up to sale, one in the name of the plaintiff for a 7 annas $\frac{1}{2}$ pies share, and the other in the name of Wasek Ali and the females for a 7 annas $\frac{1}{2}$ pies, with proportionate Government revenues. Neither Wasek Ali nor the females appear to have ever taken any steps to have the mistake corrected. The *hissya* No. 2 consisting of the whole of 7 annas $\frac{1}{2}$ pies stood in the name of the plaintiff though erroneously, and when the Government revenue for that share fell into arrears the Collector put up that *hissya* for sale, and if we are to hold that the entire *hissya* No. 2 did not pass to the purchaser because the person in whose name it stood recorded did not possess the entire 7 annas $\frac{1}{2}$ pies share, we would be introducing uncertainty into auction sales for the purpose of realizing revenue which, as pointed out by Phear J., was not the intention of the legislature.

Lastly, it was contended on behalf of the appellant, that the Court of first instance having found that the sale of *hissya* No. 2 was brought about by the plaintiff fraudulently, the Court of appeal below ought to have come to a finding upon the point, and it is wrong in holding that no question of fraud or mistake comes in. But the only ground upon which the Court of first instance found that the revenue sale was brought about by the fraud of the plaintiff is that he took no steps to have the mistake in the matter of separate account having been opened in respect of a 7 annas $\frac{1}{2}$ pies share rectified. But the separate accounts were opened several years before the sale for arrears of revenue, and we cannot say that there was any obligation on the part of the plaintiff to have the

mistake corrected for the benefit of Wasek Ali or persons representing him.

We are not concerned with a consideration of the rights of the females. As already stated the purchaser of their rights has been held in a previous suit to have lost his rights by reason of the revenue sales, and both the plaintiff and the defendant were parties to that suit.

We are of opinion that the entire 7 annas 1½ pies share constituting *hissya* No. 2 passed to the plaintiff at the sale for arrears of revenue, and this appeal will accordingly be dismissed with costs.

O. M.

Appeal dismissed.

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CIVIL REFERENCE.

Before Hookerjee and Richardson J.J.

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March 22.

SADARJAN BIBI.*

Specific Performance—Contract to lend or borrow money—Suit for balance of mortgage money—Damages—Provincial Small Cause Courts Act (IX of 1887) Sch II, cl. 15 16—Civil Procedure Code (Act 1 of 1908) s 113, O. XLII r 1.

A suit for specific performance of a contract to lend or borrow money is not maintainable.

Rogers v. Challis (1), *Nichel v. Mosenthal* (2) *Laros v. Gurety* (3) and *The South African Territories v. Wallington* (4) followed.

* Civil Reference No. 1 of 1915 by Sris Chandra Banerjee Munshi, Iswarganj, Mymensingh exercising the powers of a Small Cause Court Judge, dated Dec. 4 1914

(1) (1879) 27 Beav. 175, 178 179 (3) (1873) L. R. 5 P. C. 346 354
(2) (1862) 30 Beav. 371, 377 (4) [1899] A. C. 309

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each with respect to a similar share, the total shares thus amounting to more than 16 annas. That, no doubt, was a mistake, but the separate accounts were opened several years before the *hissyas* were put up to sale, one in the name of the plaintiff for a 7 annas $\frac{1}{2}$ pies share, and the other in the name of Wasek Ali and the females for a 7 annas $\frac{1}{2}$ pies, with proportionate Government revenues. Neither Wasek Ali nor the females appear to have ever taken any steps to have the mistake corrected. The *hissya* No. 2 consisting of the whole of 7 annas $\frac{1}{2}$ pies stood in the name of the plaintiff though erroneously, and when the Government revenue for that share fell into arrears the Collector put up that *hissya* for sale, and if we are to hold that the entire *hissya* No. 2 did not pass to the purchaser because the person in whose name it stood recorded did not possess the entire 7 annas $\frac{1}{2}$ pies share, we would be introducing uncertainty into auction sales for the purpose of realizing revenue which, as pointed out by Phear J., was not the intention of the legislature.

Lastly, it was contended on behalf of the appellant, that the Court of first instance having found that the sale of *hissya* No. 2 was brought about by the plaintiff fraudulently, the Court of appeal below ought to have come to a finding upon the point, and it is wrong in holding that no question of fraud or mistake comes in. But the only ground upon which the Court of first instance found that the revenue sale was brought about by the fraud of the plaintiff is that he took no steps to have the mistake in the matter of separate account having been opened in respect of a 7 annas $\frac{1}{2}$ pies share rectified. But the separate accounts were opened several years before the sale for arrears of revenue, and we cannot say that there was any obligation on the part of the plaintiff to have the

mistake corrected for the benefit of Wasek Ali or persons representing him.

We are not concerned with a consideration of the rights of the females. As already stated the purchaser of their rights has been held in a previous suit to have lost his rights by reason of the revenue sales, and both the plaintiff and the defendant were parties to that suit.

We are of opinion that the entire 7 annas 1½ pies share constituting *hissya* No. 2 passed to the plaintiff at the sale for arrears of revenue, and this appeal will accordingly be dismissed with costs.

O. M.

Appeal dismissed.

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CIVIL REFERENCE.

Before Mookerjee and Richardson J.J.

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March 22.

SADARJAN BIBI.*

Specific Performance—Contract to lend or borrow money—Suit for balance of mortgage money—Damages—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 15 16—Civil Procedure Code (Art. 1 of 1908) s. 115, O. XL, r. 1

A suit for specific performance of a contract to lend or borrow money is not maintainable.

Rogers v. Challis (1), *Nichel v. Mosenthal* (2), *Laros v. Gurety* (3) and *The South African Territories v. Wallington* (4) followed.

* Civil Reference No. 1 of 1915 by Sris Chandra Banerjee Munif, Iwarganj, Mymensingh exercising the powers of a Small Cause Court Judge, dated Dec. 4, 1914.

(1) (1859) 27 Bent 175, 178 179. (3) (1873) L. R. 5 P. C. 346 354.
(2) (1862) 30 Bent 371, 377. (4) [1898] A. C. 309.

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each with respect to a similar share, the total shares thus amounting to more than 16 annas. That, no doubt, was a mistake, but the separate accounts were opened several years before the *hissyas* were put up to sale, one in the name of the plaintiff for a 7 annas $4\frac{1}{2}$ pies share, and the other in the name of Wasek Ali and the females for a 7 annas $4\frac{1}{2}$ pies, with proportionate Government revenues. Neither Wasek Ali nor the females appear to have ever taken any steps to have the mistake corrected. The *hissya* No. 2 consisting of the whole of 7 annas $4\frac{1}{2}$ pies stood in the name of the plaintiff though erroneously, and when the Government revenue for that share fell into arrears the Collector put up that *hissya* for sale, and if we are to hold that the entire *hissya* No. 2 did not pass to the purchaser because the person in whose name it stood recorded did not possess the entire 7 annas $4\frac{1}{2}$ pies share, we would be introducing uncertainty into auction sales for the purpose of realizing revenue which, as pointed out by Phear J., was not the intention of the legislature.

Lastly, it was contended on behalf of the appellant, that the Court of first instance having found that the sale of *hissya* No. 2 was brought about by the plaintiff fraudulently, the Court of appeal below ought to have come to a finding upon the point, and it is wrong in holding that no question of fraud or mistake comes in. But the only ground upon which the Court of first instance found that the revenue sale was brought about by the fraud of the plaintiff is that he took no steps to have the mistake in the matter of separate account having been opened in respect of a 7 annas $4\frac{1}{2}$ pies share rectified. But the separate accounts were opened several years before the sale for arrears of revenue, and we cannot say that there was any obligation on the part of the plaintiff to have the

mistake corrected for the benefit of Wasek Ali or persons representing him.

We are not concerned with a consideration of the rights of the females. As already stated the purchaser of their rights has been held in a previous suit to have lost his rights by reason of the revenue sales, and both the plaintiff and the defendant were parties to that suit.

We are of opinion that the entire 7 annas 1½ pies share constituting *hissya* No. 2 passed to the plaintiff at the sale for arrears of revenue, and this appeal will accordingly be dismissed with costs.

O. M.

Appeal dismissed.

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CIVIL REFERENCE.

Before Monkerjee and Richardson J.J.

SHEIKH GALIM

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March

SADARJAN BIBI.*

Specific Performance—Contract to lend or borrow money—Suit for balance of mortgage money—Damages—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 15–16—Civil Procedure Code (Act V of 1908) s. 113, O. XLII, r. 1.

A suit for specific performance of a contract to lend or borrow money is not maintainable.

Rogers v. Challis (1), *Sichel v. Mosenthal* (2), *Larios v. Gurety* (3) and *The South African Territories v. Wallington* (4) followed.

* Civil Reference No. 1 of 1915 by Sris Chandra Banerjee Munshi, Iwarganj, Mymensingh exercising the powers of a Small Cause Court Judge, dated Dec. 4, 1914.

(1) [1879] 27 Beav. 175, 178, 179. (3) [1873] L. R. 5 P. C. 346, 354
(2) [1862] 30 Beav. 371, 377. (4) [1898] A. C. 309

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terms from a third person and refused to perform his agreement with the plaintiff. The plaintiff asked for specific performance which was refused. The Master of the Rolls (Sir John Romilly) said :

"It certainly is new to me, that this Court has ever entertained jurisdiction in a case where the only personal obligation created is, that one person says, if you will lend me the money I will repay it and give you good security, and the terms are settled between them. The Court has said, that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said, that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, I have sustained pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation, and a jury would easily assess the amount of the damage which the plaintiff has sustained. I express no opinion whether an action (that is, an action for damages) would or would not lie."

In that case an attempt was made to compel a man to borrow money. In *Sichel v. Mosenthal* (1), an attempt conversely to compel a man to lend money was equally unsuccessful. The same learned Judge said : "It would be quite new to me to hear that this Court could specifically enforce a contract to lend money, and as to compelling a person to borrow money according to his agreement, that was the point which I decided in *Rogers v. Challis* (2). He went on to suggest that the proper remedy was an action for damages.

These cases were cited and approved by the Privy Council in *Larios v. Bonamy Y Gurety* (3), where

(1) (1862) 30 Beav. 371, 377 (2) (1859) 27 Beav. 175, 178, 179.

(3) (1873) L. R. 5 P. C. 346, 354

the agreement which it was sought to enforce took the form of a conditional sale. Their Lordships said: "The parties throughout the negotiation which led up to the contract were stipulating for advances of money on one side, and for security for those advances on the other: the pleadings state and admit an agreement of that nature; and it seems impossible to treat the cause of action in this case as anything more than the breach of a contract to honour the drafts of the respondent to the extent of the amount agreed to be advanced and placed to his credit. And, upon a full consideration of the arguments and the authorities, their Lordships are constrained to admit that the Court of Chancery would not have entertained a suit for the specific performance of such an agreement, but would have left the party aggrieved by the breach of it to seek his remedy, where he would find an adequate remedy, in a Court of Law."

The case of the *South African Territories v. Wallington* in the House of Lords (1) is to the same effect.

Upon the principle so exemplified, it is clear that the present suit, regarded as a suit for specific performance of the contract between the parties, does not lie. Nor would such a suit or a suit for the rectification of the instrument be cognizable by a Court of Small Causes: Provincial Small Cause Courts Act, 1887, Schedule II, clauses (15) and (16). Both the questions referred must therefore be answered in the negative.

On the other hand, it is open to the plaintiff to sue in the Small Cause Court for damages for the breach of contract, provided the damages are within the pecuniary jurisdiction of the Court.

If the plaintiff is prepared to confine himself to a claim for damages within the jurisdiction of the

(1) [1898] A. C. 309.

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Court to award, he may be given an opportunity to make the necessary amendments in his plaint and the suit may then be proceeded with. Otherwise the plaint should be returned to him.

G. S.

APPELLATE CIVIL.

Before Fletcher and Tennon JJ.

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JOGENDRA CHANDRA BANERJEE

v.

PHANI BHUSHAN MOOKERJEE.*

Hindu Law—Stridhan—Inheritance—Female heirs.

Stridhan inherited by female heirs does not become the latter's stridhan. The female heirs take only a Hindu woman's estate in the property.

Sheo Shankar Lal v. Debi Sahai (1), *Prankissen Laha v. Noyanmoney Dassee* (2) and *Huri Doyal Singh Sarman v. Grish Chunder Mulerjee* (3) referred to

SECOND APPEAL by Jogendra Chandra Banerjee, the defendant No. 3.

This was a suit for establishment of title to the disputed lands and for confirmation of possession thereto. One Khantamani Debi was the original plaintiff in the case. She was the daughter of one Manikmani Debi, who possessed the disputed property as her stridhan. The plaintiff claimed the property as

* Appeal from Appellate Decree, No. 2911 of 1911, against the decree of Asutosh Banerjee, Subordinate Judge of Burdwan, dated July 27, 1911, modifying the decree of Gopeshwar Banerjee, Munsif of Katwa, dated March 22, 1910.

(1) (1903) I. L. R. 25 All. 468; (2) (1879) I. L. R. 5 Calc. 222;

L. R. 30 I. A. 202. (3) (1890) I. L. R. 17 Calc. 911.

her stridhan by inheritance from her mother. The disputed property was purchased by the defendant No. 3 in execution of a mortgage decree obtained by the defendant No. 1 against the defendant No. 2, the son of the plaintiff. During the pendency of the suit, the original plaintiff died, and after her death her grandsons by two of her sons were substituted in her place on the basis of a deed of gift executed in their favour by the original plaintiff before her death. The donees, the grandsons of the plaintiff, were not added as parties to the suit after the execution of the deed of gift.

The defendant No. 1 appeared and denied the title of the original plaintiff amongst other things. The defendant No. 2 did not appear though served with summons. The defendant No. 3 contested the suit on the grounds that Khantamani was not the owner of the property, but the defendant No. 2 was, as heir of his maternal uncle, the brother of Khantamani, and that the plaintiffs were not entitled to be substituted in her place.

The defendant No. 1 afterwards came to terms with the plaintiffs; and the substituted plaintiff No. 2 gave up his claim. This plaintiff was also the guardian of the plaintiff No. 3, his brother, who was a minor. He was not allowed to give up the claim of the minor brother.

The Court of first instance decreed the suit as against the defendant No. 1 in terms of the compromise filed by him, *ex parte* against the defendant No. 2, and on contest against the defendant No. 3 who was held liable for the whole cost of the suit. The title of the plaintiffs Nos. 1 and 3 was declared to the extent of 12 annas and their possession was confirmed, the sale was set aside, and the defendant No. 3 was held entitled to get back his money if it was in deposit.

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The defendant No. 3 appealed. The decree was modified only as regards the costs in the suit and appeal.

Thereupon, the defendant No. 3 again filed this second appeal.

Babu Risheendranath Sarkar (with him *Babu Baikuntha Nath Mitra* for *Dr. Dwarkanath Mitra*), for the appellant. The suit is not maintainable by the substituted plaintiffs. They cannot claim the property either as heirs of the original plaintiff or by the deed of gift. If the plaintiff had got an absolute estate, the property would devolve on her son, the defendant No. 2, on her death. If she had a widow's estate, she had no power of alienation. I contend the original plaintiff had only a widow's estate: see *Golap Chandra Sastri's Hindu Law* (4th Ed.); p. 421, *Mayne's Hindu Law* (8th Ed.), p. 937, *Tievelyan's Hindu Law*, p. 448, and *Prankissen Laha v. Noyanmoney Dassee* (1), *Huri Doyal Singh Sarmana v. Grish Chunder Mukerjee* (2), *Sheo Shankar Lal v. Debi Sahai* (3) and *Sheo Partab Bahadur Singh v. The Allahabad Bank* (4).

The deed of gift, moreover, is void, because there was no acceptance on the part of the donees during the lifetime of the donor: Transfer of Property Act, s. 122. I say there was no acceptance, because if there were, why did they not make any effort to be added as a party after the execution of the deed of gift? They were only substituted as heirs after her death.

The property, therefore, devolved on the defendant No. 2 after the death of the original plaintiff, and the appellant acquired title by estoppel.

(1) (1879) I. L. R. 5 Calc. 222. (3) (1903) I. L. R. 25 All. 468;

(2) (1890) I. L. R. 17 Calc. 911. L. R. 30 I. A. 202.

(4) (1903) I. L. R. 25 All. 476; L. R. 30 I. A. 209.

Babu Hemendra Nath Sen, for the respondents. The defendant No. 3 has purchased the property in execution of a decree against a person who had no interest in the disputed property. The appellant, who is the defendant No. 3, has therefore got no title whatever to the property and cannot contest the suit.

Babu Risheendranath Sarkar, in reply. A remand is not only unnecessary, but will not be proper.

Cur. adv. vult.

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FLETCHER J. This is an appeal by the defendant No. 3 against the judgment of the learned Subordinate Judge of Burdwan modifying the decision of the Munsif. The suit was brought by the original plaintiff, Khantamoni Debi, for declaration of title to the property in suit.

The defendant No. 2 was the son of the original plaintiff. The defendant No. 1 was a mortgagee under him and the defendant No. 3 was the purchaser in execution of the property under a decree founded on the mortgage in favour of the defendant No. 1.

The allegations in the plaint alleged that the property formed the stridhan of Manikmani and passed on her death to her two daughters, the 2nd daughter's share reverting on her death to the original plaintiff, her sister. This is the title set up in the plaint and on which the present suit must stand or fall. No case was set up in the plaint nor was any issue framed as to whether or not the original plaintiff had obtained a title to the property by adverse possession. The original plaintiff, some time before her death, executed a deed of gift in favour of her grandsons the present plaintiffs, the son and nephews of the defendant No. 2. The only question, therefore, that arises on the pleadings and issues, is assuming as the lower Appellate Court has found that the property was the stridhan of Manikmani,

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whether the plaintiffs are entitled to succeed in the present suit. The law is not open to doubt that stridhan inherited by female heirs does not become the latter's stridhan. The female heirs take only a Hindu woman's estate in the property. This was decided finally in the case of *Sheo Shankar Lal v. Debi Sthai* (1). The same view had been expressed in this Court in the cases of *Prankrisen Laha v. Noyamoney Dassee* (2) and *Huri Doyal Singh Sarmana v. Grish Chunder Mukerjee* (3). In the present case, the present plaintiffs can only succeed if the original plaintiff took an absolute interest in the property. This the original plaintiff had not and the substituted plaintiffs cannot maintain this suit. In my opinion the judgment appealed against ought to be reversed and the plaintiffs' suit dismissed. The plaintiffs respondents must pay to the appellant his costs in this Court and in the Courts below.

TEUNON J. I agree.

S. M.

Appeal allowed.

(1) (1903) I L R 25 All 468,
L. R. 30 I. A. 202.

(2) (1879) I L R 5 Cale 222.
(3) (1890) I L R 17 Cale 911.

APPELLATE CIVIL.

Before, Mookerjee and Richardson J.J.

HAR SHYAM CHOWDHURI

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v.

March 25

SHYAM LAL SAHU.*

Subrogation—Prior mortgage—Fraudulent suppression of, by vendor.

If A purchases a property subject to three successive charges X, Y and Z with full knowledge of their existence, and retains a portion of the purchase money in his hands with a view to satisfy the mortgages Y and Z, but subsequently discharges the security Z, he cannot on satisfaction of the mortgage X use it as a shield against the mortgage Y.

Bireswar Prosad v. Lala Saranam Singh (1) and *Hiam v. Vogel* (2) followed.

But where the purchaser found on enquiry that there were only two subsisting charges Y and Z to be satisfied, but discovered after his purchase that there was a prior charge X which was falsely described as satisfied in the mortgage instrument of Y, (in a suit upon bond X)

Held, that from whatever point of view the case may be considered, the purchaser was entitled to priority in respect of the payment made by him to satisfy the first mortgage X.

Moheb Lal v. Mohant Baijan Das (3) followed.

Held, also, that the purchaser was not entitled to priority on the basis of the payment made by him to satisfy the second mortgage Y.

SECOND APPEAL by Har Shyam Chowdhuri, the defendant No. 5.

This is an appeal in a suit on a mortgage bond executed by the father of defendants Nos. 1 to 3 in favour

* Appeal from Appellate Decree, No. 2757 of 1912 against the decree of A. Mellor, District Judge of Darbhanga, dated Feb. 2, 1912, modifying the decree of Charu Chandra Mukherjee, Subordinate Judge of Darbhanga, dated April 28, 1911.

(1) (1907) 6 C. L. J. 134

(2) (1879) 69 Missouri 529.

(3) (1853) I. L. R. 9 Calc 961, I. L. R. 10 I. A. 62

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of Gobardhan Lal defendant No. 4, on the 27th December 1897 for Rs. 700. The mortgagee sold the bond to the plaintiff on the 12th September, 1906, and the mortgagor sold the equity of redemption to Har Shyam Chowdhuri on the 15th October 1901 for Rs. 2,238. The property in dispute had been the subject of three mortgage transactions. The first mortgage was created on the 29th March 1888 for a sum of Rs. 700 which carried interest at the rate of 24 per cent. per annum, the second was on the 22nd July 1895 to secure a loan of Rs. 500 on interest at 18 per cent. per annum; the third mortgage, now sought to be enforced, was created on the 27th December 1897, to secure a loan of Rs. 700 which bore interest at 18 per cent. per annum. Defendant No. 5's conveyance recited that there were only two mortgages on the property, namely, those of 1895 and 1897. The purchaser, who was allowed to retain in his hands the entire consideration, agreed to apply the money in satisfaction of the dues on these two mortgages. He subsequently discovered that there was the prior mortgage of 1888 on the property purchased by him. He accordingly satisfied the mortgage of 1888 and 1895. On the 21st June 1910 the mortgagee of 1897 then commenced this action in the Court of the Subordinate Judge of Darbhanga to recover his dues. The purchaser under the conveyance of 1901 contested the suit and urged that he was entitled to priority to the extent of the mortgages of 1888 and 1895.

Both the learned Subordinate Judge and, on appeal, the learned District Judge of Darbhanga decided against the defendant No. 5, who in consequence preferred this second appeal to the High Court.

Babu Narendra Kumar Bose, for the appellant.

Babu Lakshmi Narayan Singh, for the respondent.

MOOKERJEE AND RICHARDSON J.J. This is an appeal by the fifth defendant in a suit to enforce a mortgage-security. The property in dispute has been the subject of three mortgage transactions. The first mortgage was created on the 29th March 1888 for a sum of Rs. 700 which carried interest at the rate of 24 per cent. per annum; the second was on the 22nd July 1895 to secure a loan of Rs. 500 on interest, at 18 per cent. per annum; the third mortgage, now sought to be enforced, was created on the 27th December 1897, to secure a loan of Rs. 700 which bore interest at 18 per cent. per annum. On the 15th October 1901, the mortgagors transferred the equity of redemption to the appellant for a sum of Rs. 2,238. The conveyance recited that there were only two mortgages on the property, namely, those of 1895 and 1897. The purchaser, who was allowed to retain in his hands the entire consideration, agreed to apply the money in satisfaction of the dues on these two mortgages. He subsequently discovered that there was a prior mortgage on the property purchased by him, namely, the mortgage of 1888. He accordingly satisfied the mortgages of 1888 and 1895. The mortgagee of 1897 then commenced this action on the 21st June 1910 to recover his dues. The suit has been contested by the appellant, the purchaser under the conveyance of 1901, who argues that he is entitled to priority to the extent of the mortgages of 1888 and 1895. The District Judge has overruled this contention and has made the usual mortgage decree in favour of the plaintiff. On the present appeal by the purchaser of the equity of redemption, it has been urged that as he has satisfied the mortgages of 1888 and 1895, he is entitled to use them as shields against the mortgagee of 1897.

In so far as the mortgage of 1895 is concerned, it is plain that this contention cannot prevail. It was

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ruled by this Court in the case of *Surjiram Marwari v. Barhamdeo Persad* (1) that the doctrine of subrogation does not apply when a person simply performs his own obligation or covenant and pays off a charge which he has undertaken or is bound to satisfy. If a person purchases a property, subject to two mortgages, retains a portion of the purchase-money for payment to the mortgagees, but pays the first incumbrance alone and not the second, he cannot treat the first mortgage as kept alive for use as a shield against the second; he cannot claim to be subrogated to the position of the mortgagee whose debt he has satisfied. The same principle was applied in the cases of *Bissweswar Prosad v. Lala Sarnam Singh* (2) and *Satnarin Tewari v. Choudhuri Sheobaran Singh* (3). The cases of *Tara Sundari Debi v. Khedan Lal Sahu* (4) and *Pruyag Narain v. Chedi Rai* (5) are not in principle opposed to this view; they merely furnish illustrations of cases which, the Court thought, (whether rightly or wrongly it is needless to discuss for our present purpose), fall outside the scope of the rule enunciated in *Surjiram Marwari v. Barhamdeo Persad* (1). In respect of the mortgage of 1895, it is clear that the appellant discharged an obligation which he had undertaken to fulfil, namely, to satisfy the mortgage, not with his own money, but with money which belonged to his vendors, and had been placed at his disposal for that specific purpose. If his vendor had satisfied the mortgage of 1895, as he might well have done, it is plain that he, as mortgagor, could not have treated the mortgage satisfied by him, as available by way of defence against the mortgagee of 1897. It follows consequently that the appellant is not entitled

(1) (1905) 2 C. L. J. 288.

(3) (1911) 14 C. L. J. 500.

(2) (1907) 6 C. L. J. 134.

(4) (1910) 14 C. W. N. 1089.

(5) (1910) 14 C. W. N. 1093.

to priority, on the basis of the payment made by him to satisfy the mortgage of 1895.

A question of some nicety, however, arises in respect of the mortgage of 1888. The appellant had undertaken to satisfy the mortgage of 1897; he did not fulfil his obligation, but chose to satisfy the mortgage of 1888. Is he then entitled to use the mortgage of 1888 as a protection against the mortgage of 1897? There can be no room for doubt that if A purchases a property subject to three successive charges X, Y and Z with full knowledge of their existence, and retains a portion of the purchase-money in his hands with a view to satisfy the mortgages Y and Z, but, subsequently, discharges the security Z, he cannot, on satisfaction of the mortgage X, use it as a shield against the mortgage Y. This follows from the case of *Bissweswar Prosad v. Lila Sarnam Singh* (1) where reference is made to the decision in *Hiam v. Vogel* (2). In that case A obtained title to a property subject to two prior charges, and at the same time undertook to satisfy the second charge. He did not fulfil his obligation, but, subsequently, when he had acquired rights under the first charge, took his stand thereon as protection against the second charge. His contention was overruled on the ground that he was bound to satisfy the second charge with the money at his disposal, and so long as that money was retained by him, he could not be allowed to prejudice the position of the second encumbrancer by means of title acquired under the first charge. If, consequently, nothing else was known in this case except that there were the three successive charges of 1888, 1895 and 1897 and that the appellant had undertaken to pay the charges of 1895 and 1897 with money placed at his disposal by the mortgagor, the mere fact that he had

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satisfied the prior charge of 1888 would not entitle him to use it as a shield against the mortgagee of 1897. The latter would *prima facie* be entitled to contend that as the appellant had in his hands money placed at his disposal by the mortgagor for the satisfaction of his dues, he could not be prejudiced by reason of the payment made by the appellant to satisfy the debt of 1888. There are, however, special circumstances in this case which, as we shall presently see, take it out of the general rule already explained.

The mortgage of 1897 recited that Rs. 400 out of the Rs. 700 secured thereby had been applied by the mortgagor to satisfy the mortgage of 1888, that the mortgagor had redeemed the mortgage and had obtained the mortgage instrument which he had made over to the new mortgagee as evidence of his title. This was, it is now conceded, an entirely false recital. The sum of Rs. 400 had not been applied to discharge the mortgage of 1888; the mortgage instrument had not been taken back from the mortgagee but was still in his custody. The appellant contends that he was misled by this recital, and purchased the property from the mortgagor in the belief that it was subject to two charges only, namely, those of 1895 and 1897. It is indisputable that the acceptance of this instrument, with an untrue recital, by the mortgagee of 1897 enabled the mortgagor to commit a fraud on the appellant. He intended to acquire a clear title to the property free of all prior charges thereon; he found on enquiry that there were only two subsisting charges to be satisfied, namely, those of 1895 and 1897. He discovered after his purchase that there was a prior charge of 1888, which was falsely described as satisfied in the mortgage instrument of 1897 held by the respondent. Consequently, if we apply the

test of intention of the person who satisfies the prior charge, as ruled in the cases of *Mohesh Lal v. Mohant Bawan Das* (1), *Gokul Das v. Ram Bux* (2), *Dinobundhu v. Jogmaya* (3), *Mahomed Ibrahim v. Ambika* (4), *The Liquidation Assets v. Willoughby* (5), *Thorne v. Cawn* (6), *Whiteley v. Delaney* (7) and *Shib Narain v. Gobinda* (8), the answer must be in favour of the appellant; for there is no shadow of a doubt that when he satisfied the mortgage of 1888, he intended to keep the security alive for use as a protection against the mortgage of 1897. On the other hand, if, as explained in *Gurdeo v. Chandrikath* (9), we treat the doctrine of subrogation as based on equitable grounds to be applied only where needed to accomplish the ends of justice, it is equally plain that the plaintiff has no claim to consideration as against the appellant; for it was the conduct of the plaintiff which enabled his mortgagor to commit a fraud on the appellant. The plaintiff has also no claim as against the appellant on any contractual basis; he is in no sense privy to the agreement between the appellant and his vendor; and, although it has recently been held that a stranger to a contract may sometimes [as explained in *Jahandar Baksh v. Ram Lal* (10)] be entitled to claim the benefit of the performance thereof, as in *Khwaja Muhammad Khan v. Nawab Husain Begam* (11) and *Debnarayan Dutt v. Chumal Ghosh* (12), that

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| (1) (1883) I. L. R. 9 Calc. 961, | (5) [1898] A. C. 321 |
| L. R. 10 I. A. 62. | (6) [1895] A. C. 11. |
| (2) (1884) I. L. R. 10 Calc. 1035; | (7) [1914] A. C. 132 |
| L. R. 11 I. A. 126. | (8) (1913) 19 C. L. J. 200 |
| (3) (1901) I. L. R. 29 Calc. 154, | (9) (1907) I. L. R. 36 Calc. 193 |
| L. R. 29 I. A. 9. | (10) (1910) 11 C. L. J. 364, 368 |
| (4) (1911) I. L. R. 39 Calc. 527: | (11) (1910) I. L. R. 32 All. 410, |
| L. R. 39 I. A. 68 | L. R. 37 I. A. 152. |
| | (12) (1913) I. L. R. 41 Calc. 137. |

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doctrine cannot be allowed to be invoked to defeat the ends of justice. From whatever point of view the case may be considered, it is consequently plain that the appellant is entitled to priority in respect of the payment made by him to satisfy the mortgage of 1888.

The result is that this appeal is allowed in part, and the decree of the District Judge modified. The appellant is entitled to priority in respect of a sum of Rs. 344, proportionate to the share of the property now in suit. We direct that the property covered by the mortgage of 1897 be sold in execution of the decree made by the District Judge free of the charges of 1888, 1895 and 1897. Out of the sale proceeds, the appellant will be first entitled to Rs. 344 and the costs of this suit; from the balance left, the plaintiff-decree-holder will be entitled to his dues; the surplus, if any, will belong to the appellant. The appellant is entitled to his costs as against the plaintiff throughout this litigation. -

G. S.

Appeal allowed in part.

ORIGINAL CIVIL.

Before Chandhuri J.

RAM DUTT RAMKISSEN DASS

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v.

April 23.

E. D. SASSOON & CO.*

*Contract—Sale of goods—Calcutta Baled Jute Association's contract—**Effect of clause containing home guarantee—Arbitration in London between Calcutta purchaser and London purchaser, whether binding on Calcutta seller.*

R. D. & Co., a firm carrying on business in Calcutta as balers of jute, sold 500 bales of jute to E. D. S. & Co. for shipment to London. The contract contained a clause in writing, known in the export trade as "a Home Guarantee," that is, a clause by which the Calcutta seller guaranteed the weight, condition and quality at the port of destination. E. D. S. & Co. sold the jute to a London buyer, who claimed an allowance for inferiority of quality; and upon an arbitration in London an award was given against E. D. S. & Co.

R. D. & Co. brought this suit in Calcutta against E. D. S. & Co. to recover the price of the 500 bales of jute. E. D. S. & Co. contended that they were not liable on the ground that under the terms of the contract R. D. & Co had guaranteed the condition and quality of the goods at the port of destination, that by the award the goods had been invoiced back to the sellers, and that in terms of the contract R. D. & Co. were bound by the award.

Held, that the clause in writing, that is to say, the "home guarantee," does not mean that a London award in a submission by the Calcutta purchaser and the London purchaser in accordance with the rules and conditions of the London Association contract of 1913, would be binding in a dispute between the Calcutta seller and the Calcutta buyer. To make such an award binding upon a total stranger to the London submission there should be a clear and unambiguous agreement to that effect.

Held, also, that although it may be correctly contended that any dispute about quality, between the Calcutta seller and the Calcutta buyer

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may be validly referred to arbitration in London in accordance to that clause, the meaning of the clause cannot be extended so as to make an award between the Calcutta purchaser and the London purchaser binding upon the Calcutta seller.

THE plaintiffs instituted this suit to recover from the defendant firm a sum of Rs. 24,406, which was made up as follows : namely, Rs. 23,406 as the price of 500 bales of jute sold to the defendant firm under a contract dated 2nd March 1914, and Rs. 1,000 as damages for the wrongful possession of the goods by the defendant firm. In pursuance of the contract and in accordance with the defendant firm's shipping instructions the plaintiffs, on the 6th March 1914, placed 500 bales of jute alongside the s.s. *Inventor*, the mate's receipts for which were obtained by the defendant firm without payment of the price of the jute, although the contract provided that payment of the goods should be cash on delivery of mate's or dock receipts, and until payment the goods should remain the property of and be held by the buyers in trust for, and at the absolute disposal of, the sellers.

The jute was shipped to London to answer a contract made by the defendant firm in the London market ; but owing to the inferior quality of the jute the London buyers refused to take delivery. Thereafter, in accordance with the terms of the London Jute Association's contracts, the matter was referred to arbitration ; and by an award dated 28th April 1914 the sellers, that is to say, the defendant firm, were directed to pay to the buyers an allowance of 40 shillings per ton plus 50 per cent. per ton, and the sellers were to have the option of invoicing back the jute to Calcutta at £23-15-0 per ton. The buyers exercised this option and purported to invoice the jute back to the defendant firm at the rate awarded. Intimation of the award was given by the defendant firm

to the plaintiffs, but the goods were not in fact returned to the plaintiffs.

The defendant firm denied that it had obtained wrongful possession of the 500 bales of jute, but admitted that it had not paid for the jute. The defendant firm contended that by the terms of bye-law 6 of the Calcutta Baled Jute Association, which was incorporated in the contract and printed on the back thereof, and the custom and usage of the Calcutta jute-trade the plaintiffs and the defendant firm became bound by the London award and became bound to give effect to that award by the plaintiffs taking back the jute at the price of £23-15-0.

Mr. A. N. Chaudhuri and *Mr. N. Sircar*, for the plaintiffs, Messrs. Ram Dutt Ram Kissen Das.

Mr. L. P. E. Pugh and *Mr. J. H. R. Surita*, for the defendant firm, Messrs. E. D. Sassoon and Co.

Cur. adv. vult.

CHAUDHURI J. By a contract dated the 2nd March 1914 the plaintiffs sold to the defendant firm 500 bales of what is known as ^(B) 2 jute. The jute was to be placed alongside exporting vessel at once. The contract form used is that of the Baled Jute Association. It purports to be the form approved by the Association dated the 30th June 1909 as appears on the form itself. In addition to the printed terms in the contract form there is a clause in writing to this effect "weight, condition and quality guaranteed by sellers at port of destination as substitute for ^(C) grade under the terms and conditions of London Association contract, 1913. Any short weight to be paid by sellers and any overweight to be refunded by buyers." One of the terms of the contract in suit is (clause 14), "cash on delivery of Mate's or Dock receipts." It appears

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that according to the shipping instructions of the defendant firm dated the 3rd March, the plaintiffs placed the goods alongside exporting vessel on the 6th March 1911. The defendant firm obtained possession of the Mate's receipt and shipping documents relating to these goods without the knowledge and consent of the plaintiffs. They had meanwhile opened two bales for purposes of inspection and marked the whole consignment with their own mark. The Mate's receipt and the shipping documents shew that their mark was used. The defendant firm did not pay the value to the plaintiffs when they received the documents as above stated. The following facts are not disputed, namely, that on or about the 17th March the plaintiffs wrote to the defendant firm complaining that they had not been paid and that the defendant firm had wrongfully obtained possession of the Mate's receipt and shipping documents. They threatened proceedings Civil or Criminal as advised. The ship had in the meantime left the port of Calcutta with the goods. It left on or about the 12th March 1914. The plaintiffs instituted this suit for the price or in the alternative for the return, of the goods, on the 28th April 1914. On the 30th April 1914 the defendant firm wrote to the plaintiffs that the London Chamber had made an award in respect of this jute, in a dispute between them and their buyers, and on the 1st May 1914 they informed the plaintiffs that it had been decided that the goods would be invoiced back. The goods, however, were never in fact invoiced back. In the written statement which was filed on the 30th June 1914 the defendant firm stated that the goods were lying in London. It, however, transpires from the defendant firm's letters Exhibits E and F, dated the 6th March 1915, that the goods have been sold and are no longer available to

the plaintiffs. The matter, therefore, stands thus. The defendant firm obtained Mate's receipt and shipping documents without paying for the goods, which they had no right to take. They purported to go to arbitration in London in a dispute between themselves and their buyers. The goods were to be invoiced back, but have not been, and having been sold cannot be invoiced back, yet the defendant firm says that the plaintiff is entitled to no relief. They put their case in this way:—That at the port of arrival these goods were objected to, on the ground of quality, by their buyers. An arbitration took place according to the terms of the English Jute Association Contract, that upon such arbitration, the objection as to quality was upheld and an allowance was awarded with option to the sellers (the defendant firm) to invoice back the goods, and that such option was exercised by them. The plaintiffs, therefore it is contended, are not entitled to recover the value of the goods, but are bound to take them back. But what are they to take back? The goods no longer exist. The defendant firm also insist that inasmuch as they suffered loss over their sale, they are entitled to recover damages from the plaintiffs, but they have reserved their right to institute a separate suit for that purpose and do not seek any such relief in this suit. They submit in their written statement that under the terms of the award the goods being invoiced back are at the disposal of the plaintiffs and therefore, this suit is not maintainable. It seems to me a very cartons position to take up. They wrongfully obtained possession of the goods and have again wrongfully sold them, after intimating to the plaintiffs that they were being invoiced back and were at the disposal of the plaintiffs. Their contention is, I understand, based upon the clause in writing I have above referred to, namely,

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what is known as the Home Guarantee Clause. The contract form used purports to be the approved form of the Baled Jute Association dated the 30th June 1909. I find, however, from Exhibits G and H, that the form used in this case is not the approved form of the 30th June 1909, although so printed, but it is the form which was adopted by the Association on the 9th September 1910. In the approved form of 1909 there is a printed clause relating to what is known as the "Home Guarantee." In the approved form of 1910 that clause is deleted. But it is not material to this enquiry as to what the approved form was in 1909 or 1910. The question is, what is the effect of the Home Guarantee Clause in writing appearing in the contract. It is contended that the Bye-laws of the Baled Jute Association printed on the back of the contract form govern this contract which has a Home Guarantee Clause. It seems to me, however, that these Bye-laws do not come into operation until there is an arbitration by the Calcutta Chamber. Let us look at the contract itself. Clause 15 of the contract provides, "in the event of any dispute whatsoever arising out of or in any way relating to this contract, or to its construction or fulfilment between the parties hereto, and whether arising before or after the date of expiration of this contract, the dispute shall be referred to arbitration in accordance with the Rules and Bye-laws (of the Baled Jute Association) endorsed on this contract. Each party to the dispute shall appoint one arbitrator and such arbitrators shall have the power to appoint an umpire. Both arbitrators and umpire must be persons engaged in the Baled Jute Trade, and their award shall be final, subject only to right of appeal to the committee." The Association Rules and Bye-laws, as printed on the reverse, are part of this contract. Bye-law No. 6 runs thus:—

"Where jute is guaranteed at port of discharge, the parties to the contract for the jute concerned agree to accept and be bound by the award which is tendered in conformity with the terms of guarantee entered into between the parties. They also agree that the signatures of the arbitrators on such award shall be sufficiently proved by the production of the award purporting to be signed by them." Learned counsel for the defendant firm contends that the award referred to in that Bye-law means the London award and not an award to be made in Calcutta; that it means the London award made upon a submission by the Calcutta purchaser who is the seller in London, and the eventual purchaser of the goods in London, and that such an award between those parties is binding upon the Calcutta seller who is no party to the arbitration in London. Let us see if the contract sustains this contention. The clause in writing contained in the contract in suit "is subject to the terms and conditions of London Association Contract, 1913." It does not say that a London award in a submission by the Calcutta purchaser and the London purchaser, in accordance with the rules and conditions of the London Association Contract of 1913, would be binding in a dispute between the Calcutta seller and the Calcutta buyer. To make such an award binding upon a total stranger to the London submission there should be a clear and unambiguous agreement to that effect. I find it difficult to imply such a term.

It is correctly contended that a contention about quality, between the Calcutta seller and Calcutta buyer, may be validly referred to arbitration in London, in accordance to that clause; but it is sought to extend the meaning of the clause by making an award between the Calcutta purchaser and the

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London purchaser binding upon the Calcutta seller. I do not think it can be so extended. It may be that the effect of the clause is, that the award in an arbitration in London between the Calcutta purchaser and the London purchaser may be tendered as evidence in a submission to the Calcutta Chamber by the Calcutta seller and Calcutta buyer of their disputes in Calcutta, and the Calcutta Chamber may make their award referring to the London award. But whether that is so or not, I do not think affects the claim in this suit. It is quite clear that possession of the goods was wrongfully obtained. Before the date of the London award, these goods were the subject of litigation in this Court. The defendant firm evidently dealt with these goods against the plaintiffs' protest. They had inspected the goods at the time of the shipment and marked them with their own mark, and treated these goods as if they were theirs. When the defendant firm had notice of this suit, it was open to them to come to this Court, and ask for a stay of proceedings if they rightly contended that the plaintiffs were bound to abide by the decision of the London Chamber. They, however, filed a written statement stating that the goods were at the disposal of the plaintiffs, yet sold them without notice to the plaintiffs, and now assert that the plaintiffs are not entitled to any relief. I am unable to take that view, and hold that the plaintiffs are entitled to the value of the goods. I decree the suit for the price of the goods with costs on Scale II. Interest on decree at 6 per cent. I may add that it was contended on behalf of the plaintiffs that under the rules of the Baled Jute Association, if there was any addition to the printed terms on their contract form, it was open to the Association to refuse to arbitrate, and that, therefore, the Arbitration rules on the printed form were not applicable to this case. There is ground for

that argument, but I do not think it matters much in this case.

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Attorneys for the plaintiffs: *C. C. Bose & Co.*Attorneys for the defendant firm: *Orr, Dignam & Co.*

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W. M. C.

SASSOON & CO.

APPELLATE CIVIL.

Before Jenkins C.J., and N. R. Chatterjee J.

PABAN SARDAR

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v.

May 26.

BHUPENDRA NATH NAG.*

Compromise—Compromise, if not recorded, effect of—Consent decree—Appeal—Civil Procedure Code (Act V of 1908) s. 96, cl. (3); O XXIII, r. 3; O. XLIII, r. 1, cl. (m)

A (consent) decree under r. 3 of O. XXIII of the Civil Procedure Code can be passed only after there has been an order that the compromise be recorded. This is not a mere matter of form, as the aggrieved party has a right of appeal against this order, and s. 96, cl. (3) of the Code is not otherwise a bar to an appeal from such a decree.

APPEAL by Paban Sardar, the plaintiff.

The facts are fully set out in the judgment of Mr. A. J. Chotzner, Additional District Judge of Alipur, which was as follows:—

"This appeal arises out of a suit in which the plaintiff applied for a declaration that a certain registered *kobala*, alleged to have been executed by him in favour of the defendant, was fraudulent and inoperative.

The case was fixed for final disposal on the 4th May 1912, but on the 25th April preceding, plaintiff filed an application, which was consented to

* Appeal from Appellate Decree, No. 2370 of 1913, against the decree of A. J. Chotzner, Additional District Judge of 24-Parganas, dated June 4, 1913, confirming the decree of Dandadhar Biwas, Subordinate Judge of Alipore, dated Aug. 13, 1912.

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by the defendant, wherein he admitted the genuineness of the *Lobala* and the receipt of the consideration money, and prayed for the dismissal of the suit. The defendant acceded to the application and relinquished his claim to costs. The Court directed that the application should be put up on the date fixed, and on that date plaintiff filed a fresh application praying for permission to withdraw his previous application on the ground that it had been procured from him by undue influence.

The learned Subordinate Judge on the evidence found that no such improper influence had been exercised upon the plaintiff as would entitle him to have his application annulled, and held that the parties were bound by the terms of the application of the 25th April. He accordingly passed a decree dismissing the suit in terms of that application.

Plaintiff has appealed and the preliminary objection has been taken on behalf of the respondent that no appeal will lie. Reference was made to section 96(3) of the Code of Civil Procedure which provides that no appeal shall lie from a decree passed by the Court with the consent of parties.

The learned pleader for the appellant, however, contends that an appeal will lie under Order XLIII, rule 1 (m). This order provides for an appeal from an order under Order XXIII, rule 3, recording or refusing to record an agreement, compromise or satisfaction.

It seems clear that this contention is unsound. His appeal is in effect directed not against the order recording the agreement, but against the decree in which that order has been embodied. The learned pleader has contended that the difference is one of form rather than of substance, but if that is so then the appeal is from the order refusing the application, and it will be barred under the statute of limitation.

I think therefore that the objection taken must prevail, and that the appeal should be dismissed with costs."

From that judgment the plaintiff preferred this appeal to the High Court.

Babu Manmatha Nath Roy, for the appellant. An appeal lay to the lower Appellate Court from the decree passed by the Court of first instance. S. 96(3) of the Code of Civil Procedure (Act V of 1908) does not apply to this case. The rule laid down in that section that no appeal lies from a consent decree does not apply when there was a dispute as to the *factum* of consent between the parties in the first Court, and the Court passed the decree on an adjudication that

there was such a consent: see *Ayyagiri Veerasalingam v. Koovur Basivi Reddi* (1), and *Brajodurlabh Sinha v. Ramanath Ghosh* (2).

[N. R. CHATTERJEA J. Do you say that you withdrew your consent on the day the case was put up for final disposal?]

No. My case, as I stated by petition on that day, the 4th May, is that the petition filed on the 25th April admitting the genuineness of the *kobala* impugned by me in the plaint and the receipt of the consideration money denied by me therein and praying for a dismissal of the suit was not filed by me willingly, but I was forced to file the same under threat and compulsion. That being so, a decree passed by the Court after rejecting my aforesaid^{*} objection cannot be said to be a consent decree within the meaning of s. 96(3) of the Code.

[JENKINS C.J. Let us first see under what provision and in what way the first Court disposed of the case.]

The provision in the Code is O. XXIII, r. 3.

Possibly the Subordinate Judge had that rule in his mind, but he did not follow its terms. He did not pass an order under that rule directing "the agreement, compromise or satisfaction to be recorded."

Babu Ram Chandra Majumdar (with him *Babu Jogesh Chandra Bose*), for the respondent. Although that order was not passed in so many words he meant to do that when in his judgment he said—"The rejection of the application of the 4th May 1912 makes the application of the 25th April operative." This is what is usually done in the Mofussil Courts; besides it is only a matter of form, and not one of substance.

[JENKINS C. J. No. This is a matter of substance, as the aggrieved party had a right of appeal against

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this order, but he could not appeal unless an order was passed.]

The appellant argued in the Court of Appeal below that his appeal might be treated as one under O. XLIII, r. 1 (m) against the order recording the compromise, and therefore the appellant had no grievance on the score that no order was passed. The lower Appellate Court held on that argument that if that was so, the appeal was barred under the Statute of Limitation.

[*Babu Manmatha Nath Roy* (interposing). When no order was passed how could an appeal against it be barred by limitation?]

The appeal in the Court of Appeal below may now be directed to be treated as an appeal against an order under O. XLIII, r. 1 (m).

[JENKINS C. J. But that cannot be done unless the other side consents.]

JENKINS C. J., AND CHATTERJEA J. We must allow this appeal and set aside the decree of the lower Appellate Court. A decree in this case was passed by the Subordinate Judge not after a hearing but on the basis of a compromise, that is to say, it was a decree justified, if at all, by Order XXIII, rule 3. But when the terms of that rule come to be examined, it is apparent that a decree can be passed only after there has been an order that the compromise be recorded. This is not a mere matter of form. It has an important result. If the decree is in accordance with a recorded compromise then it may well be contended that the provisions of section 96, clause (3) of the Code apply and the person feeling himself aggrieved by such a decree may be without the remedy of an appeal from that decree. I put it in a tentative form as whether it is so or not is not a matter which calls for our

express decision now. But the remedy of a person who says that in fact there was no compromise is that he is able to appeal from the order directing the compromise to be recorded under Order XLIII, rule 1, clause (m), which permits an appeal from an order under rule 3 of Order XXIII, recording or refusing to record a compromise. In this case there was no order that the compromise be recorded; and accordingly there was no order from which an appeal could be preferred. And as there was no order, so there could not be a decree under Order XXIII, rule 3. The result has been that though the plaintiff maintains that he did not enter into this compromise he has not had the opportunity which the law provides of discussing this question not only in the Court of first instance but, if necessary, in the Court of Appeal. The appellant, therefore, appears to me to be a person under a distinct grievance and none the less because apparently the learned Subordinate Judge thought badly of him.

We can only secure to him the rights to which he is entitled by setting aside the decree that has been passed by the Munsif on the ground that there was no order that the compromise be recorded. The case must go back to the Court of first instance in order that it may then be determined according to law. What the course there will be we need not now anticipate. It is sufficient for us to say that the appeal must be allowed and the decrees of the Additional District Judge and the Subordinate Judge must be set aside and the case sent back to the Court of the Subordinate Judge of Alipore in order that he may deal with it according to law. Costs hitherto incurred will abide the result.

G. S.

Appeal allowed; case remanded.

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APPELLATE CIVIL.

Before Jenkins C.J., and N. R. Chatterjee J.

DEBENDRA NATH DAS

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v.

May 24. BIBUDHENDRA MANSINGH.*

Letters Patent Appeal—True result of cancelling therein of a judgment of reversal of a single Judge of the High Court—Leave to appeal to Privy Council—Letters Patent, 1865, cl. 15, 36, 39—Civil Procedure Code (Act V of 1908), ss. 110, 115—“Court immediately below.”

In an appeal under clause 15 of the Letters Patent (or Charter) the cancelling of a judgment of reversal passed by a single Judge of the High Court results in an affirmation of the decision of “the Court immediately below.”

Such a Judge sitting alone is not a Court subordinate to the High Court; and thus no decision of a single Judge can be revised under s. 115 of the new Code.

APPLICATION for leave to appeal to His Majesty in Council by Debendra Nath Das, the defendant.

The plaintiff, Bibudhendra Mansingh Bhramabar Rai, is the proprietor of *killa* Dompara in which mouza Gayalbarek is situated. On the 7th June 1911, the plaintiff's predecessor executed a *môkarari* lease in respect of 257 *mans*, 9 *gants*, and 15 *biswas* of land in the said mauza in favour of one Gokulananda Chowdhury who, on the 17th July 1907, executed a deed of relinquishment in favour of Debendra Nath Das, the present defendant. Under the terms of the said lease (which left the lessee no option of converting it into a tenure by bringing the land under cultivation by establishing tenants on it), the lessee

* Application for leave to appeal to His Majesty in Council, No. 2 of 1914.

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Babu Narendra Chandra Bose, for the petitioner (defendant), submitted that as the judgment of the High Court was one of reversal leave to appeal to the Privy Council ought to be granted, as the Court of first instance to whom that matter had been referred for investigation had determined that the amount or value of the subject matter in dispute on appeal to His Majesty in Council exceeded Rs. 10,000, and the amount or value of the subject matter of the suit was the same.

Babu Ram Charan Mitter, for the plaintiff (opposite party). There is no provision in the Civil Procedure Code for the same case being heard twice in the High Court.

Section 96 of the Code implies and s. 110 has the words "Court immediately below," and under s. 111 of the Code no appeal lies to the Privy Council, from the decision of Mr. Justice Richardson sitting alone.

Further, this is a decision of the High Court affirming, and not reversing, the decision of the Court immediately below. Mr. Justice Richardson is not the 'Court immediately below,' but it is that of the Special Judge of Cuttack who was the Court of first appeal. The Code of Civil Procedure contemplates only two appeals. Besides, the value not being less than Rs. 1,000, but above Rs. 10,000 as it now appears, Mr. Justice Richardson sitting singly had no jurisdiction to hear this appeal.

If this Court had affirmed the judgment of Mr. Justice Richardson, then the appellant would have had to go to the Privy Council direct for special leave. Sections 109 and 110 of the Code reproduce clause 39 of the Letters Patent. Further, no important questions of law arise in this case.

Leave can be granted in this case only if an important question of law is involved.

Babu Narendra Chandra Bose, for the appellant, in reply. I am prepared to argue that a substantial question of law is involved in the present case.

Cur. adv. vult.

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JENKINS C. J. This is an application for a certificate that, as regards amount or value and nature, the case fulfils the requirements of section 110 of the Code of Civil Procedure or that it is otherwise a fit one for appeal to His Majesty in Council.

To ascertain the amount or value, the matter was referred to the Court of first instance (Order XLV, rule 5). That Court has determined the amount or value and has returned its report according to which the amount or value exceeds Rs. 10,000. We see no reason to dissent from that determination.

It only remains to be seen whether as regards nature the requirements of section 110 are fulfilled. The Court of first instance as well as the lower Appellate Court decided adversely to the present applicant. On appeal to the High Court, a single Judge reversed the decree of the lower Appellate Court. From this judgment of a single Judge there was an appeal to the High Court under clause 15 of the Charter with the result that the judgment of the single Judge was reversed by a Bench of two Judges. It will thus be seen that the first judgment of the High Court reversed the decree of the Court immediately below, but that this reversal was afterwards in effect cancelled with the result that the only effective judgment of the High Court affirmed the decision of the Court immediately below (section 110, Civil Procedure Code).

This appears to me to be the true result of the Letters Patent and the Code, for the Code makes no provision for an appeal within the High Court, that is

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to say, from a single Judge of the High Court. This right of appeal depends on clause 15 of the Charter.

And here I may point out that a Judge sitting alone is not a Court subordinate to the High Court, but performs a function directed to be performed by the High Court (clause 36, Letters Patent). And thus no decision of a single Judge can be revised under section 115 of the Code.

But though in this view of the matter the decree of the Court immediately below has been affirmed, it will be right to grant a certificate for there is a substantial question of law involved and it makes the case all the more a fit one for appeal to His Majesty in Council that on the question involved, a Judge, of the High Court took a different view from that which ultimately prevailed.

The certificate sought must therefore be granted that as regards amount or value and nature the case fulfils the requirements of section 110 of the Code.

N. R. CHATTERJEA J. concurred.

G. S.

Certificate granted.

APPELLATE CIVIL.*Before Fletcher and Teunon JJ.*

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v.

April 8.

SHIB PERSHAD RAM.*

Appeal—Consolidation of Appeals—Plaint, amendment of, when allowable—Practice.

The Code of Civil Procedure contains no provisions for consolidating proceedings in India. Whether the Court has jurisdiction to consolidate proceedings or not, it would only do so where the consolidation is asked for before the trial of the suits begins or where the evidence given in the two cases is common in both of them.

No amendment of plaint can be allowed where the proposed amendment would take away from the defendants, if allowed, a right that they would have if the plaintiffs had proceeded against them by way of original suit.

APPLICATION by Janardan Kishore Lal and another, the plaintiffs.

The plaintiffs, who were minors, and whose estates were under the Court of Wards, sued the defendants on the 18th March, 1909, (suit No. 119 of 1909) to recover arrears of minimum royalty in respect of certain mining leases that were held by the defendants as transferees from the original lessee. The amounts sued for were a portion of the royalty payable for 1312, the whole of the royalty payable for 1313 and 1314, and the royalty up to the Pons *kist* of 1315 B. S. There was also the prayer that as the plaintiffs believed that the defendants raised coal much in

* Application in re Appeals from Original Decrees No. 147 of 1911 and No. 216 of 1913.

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excess of the quantity guaranteed and as the exact quantity raised thus was not yet known to the plaintiffs, they might be allowed to reserve their right to bring a separate suit for the excess quantity on ascertainment. The Court allowed this on the day the suit was filed. The primary Judge (Babu Bankim Chandra Mitra) passed a modified decree in favour of the plaintiffs on the 27th June, 1910. Against this decision, the plaintiffs filed an appeal in the High Court, the appeal being R. A. 117 of 1911.

On the 14th November, 1910, the plaintiffs filed another suit (suit No. 595 of 1910) against the same defendants in respect of the aforesaid coal mines for recovery of minimum and excess royalty due to them, viz., minimum royalty from Kartik to Chaitra 1311, Baisakh to some portion of the month of Pous of 1312, Magh to Chaitra *kist* of 1315, the whole of 1316 and for Baisakh to Aswin of 1317 and excess royalty for the years 1312, 1313, 1314, 1315 and 1316. In this suit they allowed a certain deduction from their total claim on account of certain specific payments that had been made by the defendant towards the payment of certain other rents that were then in arrears. The Sub-ordinate Judge (Babu Bijoy Gopal Basu) disallowed the claim for the period prior to Pous 1312, as not included in the previous suit and therefore barred under O. II, r. 2, Civil Procedure Code, but allowed the rest of the claim, both as regards minimum and excess royalty. Against this decision, both parties appealed to the High Court. The defendant's appeal was numbered R. A. 208 of 1913, and the plaintiffs' appeal R. A. 216 of 1913.

After filing the appeal No. 216 of 1913, the Court of Wards made an application that appeals 147 of 1911 and 216 of 1913 be heard one after another, and the said application was granted on the 19th December, 1913.

When the appeals came on for hearing, the Court of Wards filed an application for consolidation of Appeals 147 of 1911 and 216 of 1913 and further prayed therein that the entire claim of the two appeals be heard as one claim. The petitioners stated in the said application that in making up the claim in suit No. 119 of 1909, the sums paid by the defendants during the years 1313, 1314 and 1315 for the royalty of those years were appropriated by the petitioners towards the previous arrears due for 1310, 1311 and 1312 and that they were therefore unable to sue for those years, but that when the Court below held the sums paid during the years in suit, viz., 1313 to 1315, should have been appropriated for those years, they became entitled to ask the Court to rebut and consolidate the appeals, as otherwise the minors would suffer.

Babu Ramcharan Mitra (Senior Government Pleader) and Babu Srishchandra Chaudhuri, for the petitioners. Section 151 of the Code of Civil Procedure gave the Court ample power to allow them to withdraw Appeal No. 147 of 1911 and consolidate the suits: *Kali Charan Dutt v. Surjoo Coomar Mundle* (1).

[*Dr. Dwarka Nath Mitra*. The trying officers were different in the two suits.]

The plaint in suit No. 595 of 1910 can be easily amended.

[TEUNON J. In that case the limitation would run from the date of the amendment. Would that help the minors?]

As regards the right to withdraw suits in appeals, see *Gregory v. Dooley Chand Kandary Mull* (2), *Mussamut Khatoon Koonwan v. Babu Hurdoot*

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excess of the quantity guaranteed and as the exact quantity raised thus was not yet known to the plaintiffs, they might be allowed to reserve their right to bring a separate suit for the excess quantity on ascertainment. The Court allowed this on the day the suit was filed. The primary Judge (Babu Bankim Chandra Mitra) passed a modified decree in favour of the plaintiffs on the 27th June, 1910. Against this decision, the plaintiffs filed an appeal in the High Court, the appeal being R. A. 147 of 1911.

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Babu Ramcharan Mitra (*Senior Government Pleader*) and *Babu Srishchandra Chaudhuri*, for the petitioners. Section 151 of the Code of Civil Procedure gave the Court ample power to allow them to withdraw Appeal No. 147 of 1911 and consolidate the suits: *Kali Charan Dutt v. Surjoo Coomar Mundde* (1).

[*Dr. Dwarka Nath Mitra*. The trying officers were different in the two suits.]

The plaint in suit No. 395 of 1910 can be easily amended.

[TEUNON J. In that case the limitation would run from the date of the amendment. Would that help the minors?]

As regards the right to withdraw suits in appeals, see *Gregory v. Dooley Chand Kandary Mull* (2), *Mussamit Khattoon Koomoor v. Babu Hardoot*

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Narain Singh (1) and *Ganga Ram v. Data Ram* (2)
See also in connection with this matter: *Raniganj
Coal Association, Limited v. Judoonath Ghose* (3).

Dr. Dwarka Nath Mitra (with him *Babu Mohini
Nath Bose*), for the opposite party. No consolidation
order can be passed, as no petition was presented to the
Court below for the same. Such an order under s. 151
would prejudice the defendants and take away from
them a valuable right secured to them under the
Statute of Limitation. The case of *Kali Charan Dutt
v. Surjoo Coomar Mundle* (4) is distinguishable from
the present one on facts. No consolidation can be made
of two distinct proceedings in the Court below, when
different witnesses were examined and cross-examined
in the two cases without any suggestion of consolidations.
A consolidation would not be a consolidation
of suits but of different proceedings. There is no
provision for consolidation at the appellate stage. It
is true there is express provision for consolidation in
Order XLV of the Code. But there is no provision
anywhere else, and the implication would go against
my learned friend. Even Order XLV would not
authorize consolidation of distinct suits not tried as
analogous in the Court of first instance.

If the plaintiffs withdraw now, their suit would be
barred to some extent.

I would further resist withdrawal on the authority
of *Kharda Co, Ltd. v. Durga Charan Chandra* (5) and
Mabulla Sardar v. Rani Hemangini Debi (6).

FLETCHER J. This application for amendment of
the plaint is, in my opinion, too late. No application
was made to the Court of first instance nor has it been

(1)(1873) 20 W. R. 163.

(2)(1885) I. L. R. 8 All. 82.

(3)(1892) I. L. R. 19 Calc. 489.

(4)(1912) 16 C. L. J. 591.

(5)(1909) 11 C. L. J. 45.

(6)(1910) 11 C. L. J. 512.

made until after the opening of the appeals before us. I think we ought not to assent to the amendment prayed for when the learned Senior Government Pleader tells us quite frankly that, if the amendment is now permitted it will, in fact, deprive the defendants of the right that the law has given them, namely, to state or allege that the claim is now barred by limitation. By the proposed amendment we would take away from the defendants, if we grant it, a right that they would have if the plaintiffs proceed against them by way of original suit.

Then the other part of the application is that we should consolidate the two appeals. The cases were not consolidated in the Court of first instance. The evidence has been taken separately and different witnesses have been called and cross-examined. The Code contains no provisions for consolidating proceedings in India. Whether or not the Court has jurisdiction to consolidate the proceedings, I imagine that it would only do so where the consolidation is asked for before the trial of the suits begins and where the evidence given in the two cases is common in both of them. I do not know any instance where the appeals have been consolidated so as to treat the evidence in one case as evidence in the other when the trial proceeded separately in the Court of first instance. In many cases in India it happens that the evidence is given before different Judges in the Court of first instance. As a matter of fact, in the present case, the Judge who decided the suit which forms the subject matter of Appeal No. 147 of 1911 is a different Judge from the Judge who decided the suit which forms the subject matter of Appeal No. 208 of 1913. To consolidate the two cases that have been tried by different Judges in that manner is a proceeding which I have never heard of before. It will also be noticed in this

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case that the second suit now under appeal, that is, the suit which forms the subject matter of appeal No. 208 of 1913, was not instituted until after the former suit had been finally determined by the Court of first instance. If the plaintiffs intended to proceed by way of amendment or otherwise, they ought to have made the application to the Court of first instance before the institution of the second suit. I see no reason which would lead us to assent to the present application. The application seems to me to be altogether a novel one. I think, therefore, that the present application should be dismissed with costs.

TEUNON J. I agree.

S. M.

Application refused.

CIVIL RULE.

Before Sharfuddin and Richardson, JJ.

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April 9.

SURENDRA NARAYAN SINGH

v.

LACHMI KOER.*

Deposit in Court—Judgment-debtor—Transferee of the judgment debtor—Bengal Tenancy Act (VIII of 1885), s. 174—Sale, setting aside of.

An application under s. 174 of the Bengal Tenancy Act can be made by the judgment-debtor alone and by no other person.

Ranjit Kumar Ghosh v. Jogendra Nath Ray (1) referred to.

* Civil Rules Nos. 58 and 59 of 1915, against the order of Sheikh Rahaman, Munsif of Katihar, dated Oct. 22, 1914.

RULE obtained by Surendra Narayan Singh, the decree-holder (petitioner).

Shortly stated the facts are these. The petitioner obtained a decree for arrears of rent. In execution of that decree the tenant's holding was sold and the petitioner purchased that holding. The holding, according to local usage and custom, was non-transferable. A transferee by purchase of the part of the non-transferable holding deposited the decretal amount, and the sale was set aside. Against this order the petitioner moved the High Court and obtained this Rule.

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Dr. Dwarka Nath Mitra (with him *Babu Rishindra Nath Sarkar*), for the petitioner, submitted that the sale could not be set aside. The deposit was not made by the judgment-debtor as contemplated by s. 174 of the Bengal Tenancy Act. O. XXI, r. 89 of the Civil Procedure Code has no application whatever: *Ram Nath Maity v. Rudra Mahanti* (1), *Ranjit Kumar Ghosh v. Jogendra Nath Ray* (2).

SHARFUDDIN AND RICHARDSON JJ. This Rule was issued on the opposite party to show cause why the order of the Munsif, dated the 22nd October 1914, should not be set aside on the ground that the opposite party was not the "judgment-debtor" within the meaning of s. 174 of the Bengal Tenancy Act.

It appears that the petitioner obtained a decree against an occupancy ryot for arrears of rent and in execution of that decree the holding was sold on the 8th September 1914 and was purchased by the petitioner. On the 22nd October 1914, a deposit of the decretal amount was made by the wife of the transferee of the tenant in question and, on that day, in consequence of the deposit thus made, the sale was set

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aside by the Munsif of Katihar in the following terms: "The judgment-debtor has deposited the entire decretal amount and compensation within time. Let the sale be set aside and the case dismissed after full satisfaction of claim."

The petitioner obtained the present Rule on the ground that s. 174 of the Bengal Tenancy Act, under which the deposit in question was made, refers only to a deposit by the judgment-debtor himself, and hence the transferee of the judgment-debtor does not come under s. 174 of the Act. It was contended that the deposit that was made by him was no deposit by the judgment-debtor and that the sale therefore should not have been set aside.

In *Ranjit Kumar Ghosh v. Jogendra Nath Ray* (1), it was held that an application under section 174 of the Bengal Tenancy Act can be made by the judgment-debtor alone and by no other person.

We, therefore, make the Rule absolute, set aside the order of the Munsif and confirm the sale.

This order will govern the other Rule No. 59 of 1915.

S. K. B.

Rule absolute.

(1) (1912) 16 C. L. J. 546.

APPELLATE CIVIL.*Before Mookerjee and Chapman J.J.*

NAGENDRA MOHAN ROY

v.

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April 28.

PYARI MOHAN SAHA.*

Joint Estate—Private partition—Encumbrance by co-sharer—Holding in severalty—Tenancy in common—Partition by Collector, effect of—Estates Partition Acts (Beng. Act V of 1897), s. 99, and Beng. Act VIII of 1876, s. 128—Practice—Abandonment of plaintiff's case and adoption by him of defendant's.

Section 99 of Beng. Act V of 1897 applies only where the lands are held *jointly* by the proprietors and *not in severalty* in pursuance of a private arrangement between the parties.

Hridoy Nath v. Mohobutnessa (1) *Amanaddi Patari v. Nabin Chandra Gope* (2), *Syed Abdul Latif v. Amanaddi Patiars* (3) followed.

Joy Sankari Gupta v. Bharat Chandra Bardhan (4) distinguished.

Where a section of an Act (here, s. 128 of Beng. Act VIII of 1876) which has received a judicial construction [*Hridoy Nath v. Mohobutnessa* (1)] is re-enacted in the same words, such re-enactment [here, s. 99 of Beng. Act V of 1897] must be treated as a legislative recognition of that construction.

Mansell v. Regina (5), *Ex parte Campbell* (6) followed.

When on a partition by the Collector, any land of an undivided joint estate, which had been encumbered by any co-sharer, is allotted to another co-sharer, the latter takes it free from the encumbrance so created.

Bijaynath v. Ramoodeen (7) followed.

* Appeal from Appellate Decree, No. 3841 of 1912, against the decree of Tarak Chandra Das, Subordinate Judge of Dacca, dated Aug. 31, 1912, reversing the decree of Kader Nath Chowdhury, Munif, Manikganj, dated June 9, 1911.

(1) (1892) I. L. R. 20 Calc. 285. (4) (1899) I. L. R. 26 Calc. 434.

(2) (1909) 11 C. L. J. 95. (5) (1857) 1 E. & B. 54, 73.

(3) (1909) 15 C. W. N. 426, 428. (6) (1870) I. L. R. 5 Cal. App. 703.

(7) (1873) I. L. R. 1 L. A. 102.

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The decision in *Sheikh Ahmedoolah v. Sheikh Ashraf Hossain* (1) [where the lands were held in *severalty*] which was followed in *Hridoy Nath v. Mohobutnissa* (2) is not, as is assumed in *Joy Sankari Gupta v. Bharat Chandra Bardhan* (3), inconsistent with, and has not consequently been overruled in effect by the decision of the Judicial Committee in *Byju Nath v. Ramoozeen* (4) [where the lands were held in common tenancy].

Byju Nath v. Ramoozeen (4), *Venkatarama v. Esuma* (5), *Shaikh Nura v. Baikunthanath Roy* (6), *Brojo Nath Saha v. Dinesh Chandra Neogi* (7), *Tarkanto v. Isucar Chandra* (8), *Joy Sankari Gupta v. Bharat Chandra Bardhan* (3) distinguished as cases where land was held in common tenancy.

A plaintiff cannot be allowed to abandon his own case, adopt that of the defendant and claim relief on that footing

Shibkrishna Sircar v. Abdul Haleem (9), *Ramroyal v. Junmenjoy* (10), *Balmukund Kesurdas v. Bhagicandas Kesurdas* (11) followed.

But that does not prevent the defendant from contending that even on the facts found the plaintiff's claim [here, for ejectment] cannot be sustained.

SECOND APPEAL by Nagendra Mohan Roy and Mano Ranjan Roy, the plaintiffs.

On the 30th March 1910 the plaintiffs brought a suit in the Court of the Munsif at Munshigunge for a declaration of their title to land and for ejectment of the defendants therefrom, alleging that the lands in dispute were included in a revenue-paying estate owned by themselves and by their co-sharers, Hara Kumar Roy and others, predecessors of the added defendants Gour Chandra Goswami and others; and that the predecessors of Pyari Mohan Saha and four others, the defendants Nos. 1 to 5, held them as a *shikmi* taluk under these co-sharers to whose exclusive share these lands had been assigned by a private

(1) (1870) 13 W. R. 447.

(6) (1913) 21 C. L. J. 596.

(2) (1892) I. L. R. 20 Calc 245

(7) (1910) 21 C. L. J. 599

(3) (1899) I. L. R. 26 Calc 434.

(8) (1912) 21 C. L. J. 603.

(4) (1873) I. L. R. 1 I. A. 106.

(9) (1879) I. L. R. 5 Calc. 602

(5) (1909) I. L. R. 33 Mad. 429.

(10) (1887) I. L. R. 14 Calc 791, 793.

(11) (1912) 15 Bom. L. R. 209.

partition long ago. In 1903 these lands were allotted to the plaintiffs on a partition of the entire estate by the Collector of Dacca under the Estates Partition Act; but they were unable to obtain *khas* possession thereof as the defendants Nos. 1 to 5 (together with their tenants Harendra Nath Saha and Gajendra Lal Saha, defendants Nos. 6 and 7) set up their right to hold them as their tenure. The plaintiffs' plea was that the defendants' *shikhi* taluk was operative, not upon the lands allotted to the plaintiffs by the Collector, but upon those allotted by him to their grantors, *i.e.*, the co-sharers. The defendants' case was that there had been no private partition among the co-sharers, and that as their *shikhi* taluk was held under all the co-sharers, the plaintiff was not competent to avoid it. On the 9th June 1911 the Court of first instance decided that the plaintiffs were entitled to eject the defendants from $\frac{1}{2}$ th of the lands allotted to them by the Collector ($\frac{1}{2}$ th thereof having been derived from the grantors of the tenure) as he found that there had been a private partition among the co-sharers whereby each was in separate possession of distinct parcels of land, and that the defendants' tenure was not held under the entire body of co-sharers. On appeal, the Subordinate Judge of Dacca by his judgment dated 31st August 1912 affirmed these findings but dismissed the plaintiffs' suit, holding that the partition by the Collector did not affect their tenure as the defendants were not and could not be parties to the partition proceedings, and that the plaintiffs had taken the lands allotted to them subject to the defendant's tenure. The plaintiffs thereupon preferred this second appeal to the Hon'ble High Court.

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Babu Prarka Nath Chakravarti (with him Mr. S. P. Sinha and *Babu Debendra Nath Bagchi*), for

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the appellants. I submit that the lands allotted to the plaintiffs at the partition by the Collector are not subject to the tenure set up by the defendants. I rely on the decision in *Joy Sankari Gupta v. Bharat Chandra Bardhan* (1). On such a partition the encumbrance is transferred to the lands allotted to the encumbrancer and section 99 of the Estates Partition Act applies. Although the lands may have been divided and are held in severalty an estate must be deemed to be held in common tenancy so long as any incident thereof, e.g., the liability to pay the Government Revenue continues joint : *Syed Abdul Latif v. Amanuddi Patwari* (2). The lands fell within the share of the heirs of some of the grantors, whose interest was acquired at a Rent Sale : see section 5 of the Estates Partition Act. This is not a partition by the Collector under section 5 or clause (a) of section 7. The finding is not supported by any evidence, and is beyond the case made by either of the parties ; and the defendants should not be allowed to defeat the claim of the plaintiffs when their allegations have been found to be untrue on the facts. (*Vide* paragraph 4 of the plaint and paragraph 10 of the written statement.) Besides in section 99 of the new Act the words "Patni or any other encumbrance" appears.

Dr. Rash Behari Ghose (with him *Babu Ramani, Mohan Chatterjee*), for the respondents. I appear for the tenure-holders. This second appeal is concluded by the finding of the Subordinate Judge that the estate was not held in common tenancy. The lease was granted several years ago and has not been produced). On the plaintiff's own case there was a previous private division of the lands and therefore this case does not fall under section 99 of Beng. Act V

of 1897. The law is summed up in the judgment in *Hridoy Nath v. Mohobutnessa* (1) regarding section 7 and partition by Collector after a private partition. Section 128 of the old Act, *viz.*, Beng. Act VIII of 1876 is similar to section 99 of the present Estates Partition Act.

- [*Babu Dwarkanath Chakravarti*. Except that the word "encumbrance" was not there.]

Tenants, whatever their position, cannot be parties to a partition suit. Then how can a tenant be affected by anything done by his landlords among themselves in his absence? By no possible means can a title that is good originally for a tenant be got rid of by the act of third parties (*viz.*, co-sharers) or anyone else. The Legislature in the new Act has followed the distinction between estates held in common tenancy and estates in which there has been a private division. The case of *Syed Abdul Latif v. Amanuddi Patwari* (2) lays down the same proposition. Sections 7, 76, and 79 of the Estates Partition Act show that an estate held in common tenancy under section 99 with regard to Government has nothing to do with the case of an estate where there has been no division. [See issue No. 6 in the Munsif's judgment.] Therefore, on plaintiffs' own case, they cannot succeed in the present suit; and the defendant can contend, that on the facts found the claim for ejectment cannot be sustained.

[*CHAPMAN J.*] Section 63 has the words "common tenancy." The Act has been considerably modified since the decision in *Hridoy Nath v. Mohobutnessa* (1). Isn't it a pure surplusage in section 99?]

In Act V of 1897 there are special provisions provided for the case of previous division. It may be that all the co-sharers joined together and did not object,

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the appellants. I submit that the lands allotted to the plaintiffs at the partition by the Collector are not subject to the tenure set up by the defendants. I rely on the decision in *Joy Sankari Gupta v. Bharat Chandra Bardhan* (1). On such a partition the encumbrance is transferred to the lands allotted to the encumbrancer and section 99 of the Estates Partition Act applies. Although the lands may have been divided and are held in severalty an estate must be deemed to be held in common tenancy so long as any incident thereof, e.g., the liability to pay the Government Revenue continues joint : *Syed Abdul Latif v. Amanuddi Patwari* (2). The lands fell within the share of the heirs of some of the grantors, whose interest was acquired at a Rent Sale: see section 5 of the Estates Partition Act. This is not a partition by the Collector under section 5 or clause (a) of section 7. The finding is not supported by any evidence, and is beyond the case made by either of the parties; and the defendants should not be allowed to defeat the claim of the plaintiffs when their allegations have been found to be untrue on the facts. (*Vide* paragraph 4 of the plaint and paragraph 10 of the written statement.) Besides in section 99 of the new Act the words "Putni or any other encumbrance" appears.

Dr. Rash Behari Ghose (with him *Babu Ramani Mohan Chatterjee*), for the respondents. I appear for the tenure-holders. This second appeal is concluded by the finding of the Subordinate Judge that the estate was not held in common tenancy. The lease was granted several years ago and has not been produced. On the plaintiff's own case there was a previous private division of the lands and therefore this case does not fall under section 99 of Beng. Act V

of 1897. The law is summed up in the judgment in *Hridoy Nath v. Mohobutnessa* (1) regarding section 7 and partition by Collector after a private partition. Section 128 of the old Act, *viz.*, Beng. Act VIII of 1876 is similar to section 99 of the present Estates Partition Act.

[*Babu Dwarkanath Chakravarti*. Except that the word "encumbrance" was not there.]

Tenants, whatever their position, cannot be parties to a partition suit. Then how can a tenant be affected by anything done by his landlords among themselves in his absence? By no possible means can a title that is good originally for a tenant be got rid of by the act of third parties (*viz.*, co-sharers) or anyone else. The Legislature in the new Act has followed the distinction between estates held in common tenancy and estates in which there has been a private division. The case of *Syed Abdul Latif v. Amanuddi Patwari* (2) lays down the same proposition. Sections 7, 76, and 79 of the Estates Partition Act show that an estate held in common tenancy under section 99 with regard to Government has nothing to do with the case of an estate where there has been no division. [See issue No. 6 in the Munsif's judgment.] Therefore, on plaintiffs' own case, they cannot succeed in the present suit; and the defendant can contend, that on the facts found the claim for ejectment cannot be sustained.

[*CHAPMAN J.*] Section 63 has the words "common tenancy." The Act has been considerably modified since the decision in *Hridoy Nath v. Mohobutnessa* (1). Isn't it a pure surplusage in section 99?

In Act V of 1897 there are special provisions provided for the case of previous division. It may be that all the co-sharers joined together and did not object,

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simply to defeat the rights of the tenure-holders. Here the lands are held in severalty.

[MOOKERJEE J. Assume that section 99 has been improperly applied. Can plaintiff succeed on general principles of equity ?]

I submit he cannot, as it is a settled proposition of law that express provisions of statute cannot be extended to other class of cases by general principles. When the Legislature amended the Act VIII of 1876 they had the decision in *Hridoy Nath v. Mohobut-nessa* (1) before them, and the fact they did not change the wording of section 99 of Act V of 1897 shows that section 128 of the old Act had been correctly construed by these decisions. It would be the very reverse of equity if the tenant is to be told that because the Collector has directed a co-sharer to take his lands, that the lands demised to him are gone.

Babu Divarkanath Chakravarti, in reply. There has never been any admission on my part such as would bar a partition as stated in section 7. Unless it can be shown that a complete previous partition with all the particulars stated in section 7 has been effected, the Collector cannot be prevented from proceeding under section 5; and in that case the partition shall be dealt with as of lands in common tenancy.

[MOOKERJEE J. Why was issue No 6 raised as to a previous private partition ?]

It was limited to the question whether any specific land was in the possession of one co-sharer so as to bind him. If that position is correct, then the case of *Joy Sankari Gupta v. Bharat Chandra Bardhan* (2) is in point. Here Sir Francis Maclean, C. J., applied the general principle of equity following the

(1) (1892) I. L. R. 20 Calc. 285.

(2) (1899) I. L. R. 26 Calc. 434.

decision of the Judicial Committee of the Privy Council in *Byjnath v. Ramoodeen* (1).

[MOOKERJEE J. How has an equivalent to the tenant's land to be got elsewhere?]

In the Privy Council case Sir William Markby was carried away by one side of the case and overlooked the fact that the tenant took a risky title, his title being subject to the Statute of Partition. In all these cases the judgment does not look into the rights of other innocent co-sharers. A mere building of dwelling houses does not take the case out of the provisions of section 7. It is nobody's case that the partition by the Collector was under section 76. If the tenant does not get the same specific plot of land it is because he took the risk of not getting that plot of land if his lessor did not get it on partition. *Joy Sankari Gupta v. Bharat Chandra Bardhan* (2) is in my favour and if *Hridoy Nath v. Mohobutnessa* (3) is not, there is a clear conflict of decisions, necessitating a reference to Full Bench.

Cur. adv. vult.

MOOKERJEE AND CHAPMAN JJ. This is an appeal by the plaintiffs in a suit for declaration of title to land and for ejectment of the defendants therefrom. The case for the plaintiffs is that the disputed lands were included in a revenue paying estate owned by themselves and by their co-sharers and that the defendants held them as a tenure under the co-sharers to whose exclusive share they had been assigned by private partition. Thereafter, on a partition of the entire estate by the Collector under the Estates Partition Act, these lands were allotted to the plaintiffs, but they were unable to obtain possession thereof, as the defendants set up their right to hold them as their

(1) (1873) L. R. 1 I. A. 105 (2) (1899) L. L. R. 26 Cal. 434.

(3) (1892) L. L. R. 20 Cal. 285

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tenure. The plaintiffs accordingly instituted this suit to establish their title and to eject the defendants on the ground that their tenure was operative, not upon the lands assigned to the plaintiffs, but upon those assigned to their grantors. The defendants denied the truth of the allegation of a prior private partition amongst the proprietors, and asserted that as their tenure was held under all the co-sharers, the plaintiffs were not competent to avoid it. On these pleadings, the issue was raised whether there was a private settlement among the proprietors as regards the possession of the lands of the original estate as stated in the plaint. The trial Court found on the evidence that there was a private settlement among the co-sharers of the estate whereby each of them came to be in separate possession of distinct parcels of land. The Court also found that the tenure was held, not under the entire body of co-sharers but under some of them only, and that of the share owned by the plaintiffs one-twelfth had been derived from the grantors of the tenure. The Court thereupon held that the plaintiffs were entitled to eject the defendants from the remaining share of the lands. On appeal by the defendants, the Subordinate Judge affirmed the findings of the first Court that there was a private division of the lands to which all the joint proprietors had agreed and upon which they had all acted. In this view the Subordinate Judge held that the partition by the Collector had not affected the tenure, as the defendants were not and could not be parties to the partition proceedings and that the plaintiffs had taken the lands allotted to them subject to the tenure held by the defendants. The plaintiffs have appealed to this Court against the decree of dismissal made by the Subordinate Judge, and have contended that under section 99 of the Beng. Act V of 1897 the lands in their

hands are not subject to the tenure set up by the defendants. In support of this view, reliance has been placed upon the decision in *Joy Sankari Gupta v. Bharat Chandra Bardhan* (1).

Section 99 of the Estates Partition Act is in these terms : " if any proprietor of an estate held in common tenancy and brought under partition in accordance with this Act, has given his share or a portion thereof in patni or other tenure or on lease or has created any other encumbrance thereon, such tenure, lease or encumbrance shall hold good as regards the lands finally allotted to the share of such proprietor and only as to such lands." It is hence essential, to make the section applicable, that the estate should be held in common tenancy. On behalf of the appellants, it has been contended that an estate must be deemed held in common tenancy so long as any incident thereof, for example, the liability to pay Government Revenue, continues joint, although the lands may have been divided and are held in severalty. This contention is opposed to the decision in *Abdul Latif v. Amanuddi* (2); there it was held that the words "estate held in common tenancy" are used in contradistinction to an estate held in severalty among the proprietors themselves by private arrangement, as is clear from the examination of sections 5, 7, 63, 76 and 79 of the Estates Partition Act. This decision is in conformity with the earlier case of *Hriday Nath v. Mohobutnessa* (3) which interpreted the corresponding section of an earlier statute (section 128 of Act VIII of 1876 B.C.). An examination of the decision in *Hriday Nath v. Mohobutnessa* (3) shows again that the view there taken was in accord with a long line of authorities decided under the

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corresponding provisions of Regulation XIX of 1814 : *Ahmedoollah v. Ashraf Hossain* (1), *Obhoy Charan v. Hari Nath* (2), *Juggesur v. Bissessur* (3). The position, therefore, is that under the Estates Partition Act, 1876, this Court, on an elaborate review of the previous state of the law, came to the conclusion, in *Hridoy Nath v. Mohobutnessa* (4) that the principle embodied in section 128 was applicable only where the lands of the estate were not held in severalty. The legislature in 1897 proceeded, presumably with full knowledge of the judicial interpretation of section 128, to reproduce its provision without any variation as section 99 of Act V of 1897. The inference seems irresistible that the judicial interpretation of section 128, to which we have referred, correctly represented the intention of the Legislature; for it is a well settled principle of construction that the Legislature is presumed to know, not only the general principles of law but the construction which the courts have put upon particular Statutes. In the words of Lord Campbell C.J. in *Mansell v. Queen* (5) and James L.J. in *Ex parte Campbell* (6), "where a section of an Act, which has received a judicial construction, is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of that construction." The inference is therefore perfectly legitimate that the Legislature has, in the new Act of 1897, adopted the settled judicial construction which is thereby sanctioned and intended to be continued in force: *Jogendra Chandra Roy v. Shyam Das* (7). We hold accordingly, on the authority of the decision in *Hridoy Nath v. Mohobutnessa* (4) which has been

(1) (1870) 13 W. R. 447.

(4) (1892) I. L. R. 20 Calc. 245.

(2) (1881) I. L. R. 8 Calc. 72.

(5) (1857) 8 E. & B. 54, 73.

(3) (1882) 12 C. L. R. 291.

(6) (1870) L. R. 5 Ch. App. 703

(7) (1909) I. L. R. 36 Calc. 543, 546

accepted as good law applicable to Act V of 1897 in *Aimanaddi v. Nabin Chandra* (1) and *Abdul Latif v. Amanuddi* (2), that section 99 applies only where the lands are held jointly by the proprietors and not in severalty in pursuance of a private arrangement between the parties. This view is not opposed to the decision in *Joy Sankari v. Bharat Chandra* (3), where the lands were held, not in severalty but in common tenancy. In these circumstances it was ruled, on the authority of the decision of the Judicial Committee in *Byjnath v. Ramoodeen* (4) that when on partition by the Collector, any land of an undivided joint estate which had been encumbered by any co-sharer was allotted to any other co-sharer, the latter took it free from the encumbrance so created. But we may observe that the decision in *Ahmedullah v. Ashraf Hossain* (5) which was followed in *Hridoy Nath v. Mohobutnessa* (6), is not, as is assumed in *Joy Sankari Gupta v. Bharat Chandra Bardhan* (3), inconsistent with and has not consequently been over-ruled in effect by the decision of the Judicial Committee in *Byjnath v. Ramoodeen* (4). As explained in *Hridoy Nath Mohobutnessa* (6) [which was not brought to the notice of the Court in *Joy Sankari v. Bharat Chandra* (3)] the lands in *Ahmedullah v. Ashraf* (5) were held in severalty, while the lands in *Byjnath v. Ramoodeen* (4) were held in common tenancy. This distinction explains the cases of *Venkatarama v. Esumsa* (7), *Sherikh Nura v. Bakuntha Nath Roy* (8), *Brojo Nath Saha v. Dinesh Chandra Neogi* (9), *Tarini Kanto v. Iswar Chandra* (10) where the decision in *Joy Sankari v.*

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| (1) (1909) 11 C.L.J. 95 | (6) (1892) 1 L.R. 21 C.L.J. 245 |
| (2) (1911) 13 C.W.N. 426 428 | (7) (1909) 1 L.R. 33 M&I. 429 |
| (3) (1899) 1 L.R. 26 C.L.J. 434 | (8) (1913) 21 C.L.J. 516 |
| (4) (1873) L.R. 11 A. 106 | (9) (1910) 21 C.L.J. 519. |
| (5) (1870) 13 W.B. 447 | (10) (1912) 21 C.L.J. 613 |

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Bharat Chandra (1) was followed. In the case before us, the Courts below have concurrently held that the lands were, under private arrangement, held in severalty and not in tenancy in common; consequently section 99, Act V of 1897, has no application. The inference follows that the plaintiffs have taken the disputed lands subject to the tenure of the defendant and are not entitled to eject them.

It has been finally argued that the defendants should not be allowed to defeat the claim of the plaintiffs when it has been found that their allegation is untrue on the facts. In our opinion there is no force in this contention. No doubt, as was laid down in the cases of *Shibkristo v. Abdool* (2), *Ramroyal v. Junmenjoy* (3) and *Balmukund v. Bhagwandas* (4), a plaintiff cannot be allowed to abandon his own case, adopt that of the defendant and claim relief on that footing. Here, however, what has happened is that each party failed to realise the legal effect of the facts alleged by him; the parties went to trial on the substantial issue in the case, namely, whether or not there had been a private partition of the lands prior to the partition by the revenue authorities and whether the tenure of the defendants was created by the entire body of landlords or by some alone of the shareholders in respect of specific lands allotted to them. This question has been answered against the defendants and in favour of the plaintiffs, but that does not prevent the defendants from contending that even on the facts found the claim for ejectment cannot be sustained.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

G. S.

Appeal dismissed.

(1) (1899) I. L. R. 26 Calc. 434. (3) (1887) I. L. R. 14 Calc. 791, 793.

(2) (1879) I. L. R. 5 Calc. 602. (4) (1912) 15 Bom. L. R. 209

CIVIL RULE.

Before Mookerjee and Richardson JJ.

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Contract—Trafficking in offices—Official corruption—Contract for return of money paid to Nazir to secure appointment as peon—Suit to enforce such contract, maintainability of—Public policy—Contract Act IX of 1872) ss. 23, 65.

The sale of a recommendation, nomination or influence in procuring a public office is illegal and void, for trafficking in offices would inevitably tend to official corruption and the Court will not assist a party who has entered into a contract tainted by moral turpitude, both sides being *particeps criminis, in pari delicto.*

Tappenden v. Randall (1) followed.

A suit to enforce a contract for the return of money paid to a Nazir to secure an appointment as a District Court peon for the plaintiff's son is not maintainable.

Bai Viji v. Nassa Nagar (2) referred to.

Pichalatty v. Naravanappa (3), discussed and distinguished.

Such an agreement is void *ab initio*, its object being opposed to public policy within the meaning of section 23 of the Indian Contract Act while section 65 thereof applies to an agreement subsequently (i) found to be void, (ii) or made void by supervening circumstances.

Balshi Das v. Nada Das (4) and *Gulabchand v. Fal Bai* (5) considered inapplicable.

RULE obtained by Ledu Coachman, the plaintiff.

Small Cause Court suit for return of money paid

* Civil Suit No. 1161 of 1914, against the decision of Nitole Banjan Gohs, Small Cause Court Judge, Barisal, dated July 25, 1914.

(1) (1801) 2 Bos & P. 467

5 E. R. 662

(2) (1853) 1 L. L. R. 10 Bern. 152.

(3) (1864) 2 MacL. R. C. R. 243

(4) (1913) 1 C. L. J. 261

(5) (1914) 1 L. L. R. 23 Bern. 411.

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to secure a public appointment disposed of by the Munsif of Barisal on 25th July 1914 by the following judgment:

"Defendant is the Nazir of the District Court. Plaintiff alleged that there was a "Contract" between the parties whereby plaintiff promised to pay Rs. 150 to the defendant and defendant promised to give a permanent pensionship to plaintiff's son in consideration thereof and if unsuccessful to restore the money. Plaintiff alleged to have paid Rs. 100 to defendant and wanted to recover the sum in this suit because defendant failed to keep his promise. The point is whether the suit is maintainable? Plaintiff relied on Sections 58 and 56 of the Contract Act and also cited *Srirangachariar v. Ramasami Ayyangar* (1), *Ram Chand Sen v. Andaito Sen* (2) and *Juggeswar v. Panchcooree* (3). Sections 58 and 56 cannot possibly apply to the facts of this case and the facts of *Srirangachariar v. Ramasami* (1) are also quite different. *Ram Chand Sen v. Andaito Sen* (2), *Juggeswar v. Panchcooree* (3) are rather against plaintiff's contention. Defendant cited *Amjadnessa Bibi v. Rahim Baks Shikdar* (4) and also *Ram Pratap Rai v. Ram Phal Teli* (5). There is hardly any room for doubt on this point. I find that the contract was void and the suit is not maintainable."

ORDER—Suit dismissed with costs."

The plaintiff thereupon moved the High Court under s. 25 of the Provincial Small Cause Courts Act, and obtained this rule calling upon the defendant to show cause why the aforesaid order should not be set aside.

Maulvi A. K. Fazlal Huq, for the petitioner.

Babu Mahendra Nath Roy, *Babu Manmatha Nath Roy* and *Babu Suresh Chandra Bose*, for the opposite party.

Cur. adv. vult.

MOOKERJEE AND RICHARDSON JJ. We are invited in this Rule to set aside a decree of dismissal in a suit for recovery of money on the basis of a contract. The defendant is the Nazir of the Court of the District

(1) (1894) 1 L. L. R. 18 Mad 189. (3) (1870) 14 W. R. 154.

(2) (1884) 1 L. L. R. 10 Calc. 1054. (4) (1914) 18 C. W. N. ccii n.

(5) (1912) 18 Ind. Cas. 9.

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Judge of Barisal. The case for the plaintiff is that there was a contract between him and the defendant that if the latter provided his son with the post of a permanent peon within two years, the plaintiff would give the defendant Rs. 150, and that if the defendant failed to secure the appointment, he would return the money paid by the plaintiff. The plaintiff asserts that in accordance with the terms of the contract, he has from time to time paid the defendant several sums aggregating Rs. 100 and that the defendant has failed to provide his son with the appointment, though the two years have elapsed. The plaintiff consequently sues to recover the money. The defendant denied the truth of the allegations of the plaintiff and also pleaded that the suit was not maintainable as it was based on an illegal and void contract. The Court below has not investigated the facts, but has dismissed the suit as not maintainable on the face of the allegations contained in the plaint. The question for determination is, whether the agreement was void, as its object was opposed to public policy within the meaning of section 23 of the Indian Contract Act.

It is well settled that contracts which have, for their object, the influencing of appointments to public offices and the restricting of the discretion vested in public officers in the selection of persons to be appointed, are illegal and void. The principle is that an officer, who has the power of appointment, should make the best appointment possible, and it is contrary to public policy that such officer be deprived of this discretionary power by a contract previously made or an obligation previously assumed; in other words, public policy forbids that a public office be made the subject, of contracts, for the contrary view would inevitably tend to official corruption. Illustrations of this doctrine will

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be found in cases of high authority [*D. Blackford v. Preston* (1), *Hartwell v. Hartwell* (2), *Thomson v. Thomson* (3), *John Card v. William Hope* (4), *Hopkins v. Prescott* (5), *The Queen v. Charrette* (6), *Parson v. Thompson* (7), *Richardson v. Mellish* (8), *Gardner v. Grant* (9)] which all affirm the rule that the sale of a recommendation, nomination or influence in procuring a public office is illegal and void. The question has frequently come up for judicial consideration in the Courts of the United States, which have emphatically condemned contracts of this nature. Mr. Justice Field, in delivering the unanimous opinion of the Supreme Court of the United States in *Providence Town Co. v. Norris* (10), observed as follows: "These offices are trusts, held solely for the public good and should be conferred from considerations of the ability, integrity, fidelity and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power, must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation for procuring these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone adjudges these agreements inconsistent with sound morals and public policy: *Gray v. Hooke* (11). Other agreements of an analogous character might be mentioned, which the Courts, for

(1) (1799) 8 T. R. 69; 4 R. R. 598. (7) (1790) 1 H. Bl. 322;

(2) (1799) 4 Ves. 810. 2 R. R. 773.

(3) (1802) 7 Ves. 470; 6 R. R. 151. (8) (1824) 2 Bing. 229;

(4) (1824) 2 B. & C. 661. 27 R. R. 603.

(5) (1847) 4 C. B. 578; (9) (1885) 13 S. & D. 662.

72 R. R. 647.

(10) (1865) 2 Wallace 45.

(6) (1819) 13 Q. B. 447.

(11) (1851) 4 N. Y. 449.

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the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly; it is sufficient to observe generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the Courts of the country." Equally explicit is the condemnation of such contracts by Mr. Justice Swayne in *Mcguire v. Corwine* (1) : "frauds of the class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare and of free government as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists and of those by whom it is administered; corruption is always the forerunner of despotism." To the same effect are the decisions in *Marshall v. B. & O. R. R. Company* (2), *Coppell v. Hall* (3) and *Trist v. Child* (4). But it is needless to multiply authorities on the subject of trafficking in offices, which will be found collected in Greenhood on Public Policy, pp. 338-349. Our attention, however, has been drawn to the decision in *Pichakuliy v. Narayanappa* (5). There the defendant had agreed, in consideration of a sum of money received by him, to obtain a more

(1) (1879) 101 U. S. 108.

(3) (1868) 7 Wallace 442.

(2) (1853) 16 Howard 314.

(4) (1874) 21 Wallace 441

(5) (1884) 2 Mad. H. C. R. 243

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favourable assessment upon certain villages in respect of waste and cultivable lands, and in case of failure to repay the amount received. In a suit to recover the amount paid to the defendant, Scotland, C.J. and Frere, J., held that the contract was not vitiated by illegality. The reason assigned in support of this view was that there was nothing to show an understanding between the parties that the defendant was to have recourse to corrupt or illegal means of any kind or that he would use personal influence which he professed to possess with any public servant. The case was thus treated as one where the defendant undertook the task of preparing and presenting before the Revenue authorities the case of the tenants and made his claim to remuneration contingent upon his success. The case is consequently distinguishable, though we are by no means convinced that the decision is based on sound principles. We affirm without hesitation the rule that any contract to appoint one to a public office or involving the sale of a public office or securing an office for the promisor or recommending him for such office is opposed to public policy and is consequently void. It is plain, therefore, that the contract, which is the foundation of this suit, is based on an unlawful consideration, is opposed to public policy and is void. It follows that, under such circumstances, when the illegality of the contract has been made to appear, the law will not extend its aid to either of the parties who will be left to abide the consequences of their own act. We are not unmindful that there are exceptions to the general rule that money paid or personal property transferred in accordance with the terms of an illegal contract cannot be recovered, notwithstanding the other party refuses to perform his part of the agreement. It is plain that although where money has

been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed if the agreement is actually criminal or immoral; where the contract is illegal because contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it. Lord Alvanley, C.J., observed in *Tappenden v. Randall* (1) that where there is moral turpitude in the contract, the Court will not allow the party, who has advanced money on such a contract, to recover it back. In the case before us, the substance of the matter is that the plaintiff, if his allegation is true, offered a bribe to the defendant to secure an appointment for his son, and made part payments which were accepted by the latter. The parties are clearly in *pari delicto* and the Court will not assist either of them. In *Collins v. Blantern* (2) where money had been paid for the purpose of stifling a prosecution for perjury, Wilmot, C.J. said: "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again." To the same effect is the observation of Kenyon, C. J. in *Howson v. Hancock* (3) where money deposited upon an illegal wager had been paid over to the winner by the consent of the loser: "there is no case to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again." The same principle is

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(1) (1801) 2 Bos. & P. 467;
5 R. R. 662.

(2) (1765) 2 Wilson 341.
(3) (1800) 8 T. R. 575.

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illustrated in *Taylor v. Chester* (1) where the consideration was immoral and, in *Kearley v. Thomson* (2) where the defendants were in substance bribed not to appear at the public examination of a bankrupt [see also *Harse v. Pearl L. A. Co.*, (3)]. The principle has been applied in this country in a case where the money had been paid to a married woman to enable her to obtain a divorce and marry the plaintiff : *Bai Vijli v. Nansa Nagar* (4). The cases mentioned at the Bar related to marriage brokerage contracts, which, as is clear from the decision in *Bakshi Das v. Nadu Das* (5) and *Gulab Chand v. Ful Bai* (6), stand on a special footing of their own and have no analogy to the case before us. The principle that the Court will not assist a party who has entered into a contract tainted by moral turpitude, should be strictly applied in the circumstances of the case now before the Court. If the Court were to assist the plaintiff to recover his money, bribery and corruption would be encouraged ; every person in the position of the plaintiff will be tempted to say, let me offer a bribe to get an appointment for my son, for I can do so with impunity and without risk or loss ; if he secures the appointment, the end is achieved, if he does not, I can sue to recover back my money. No Court of Justice will tolerate such a position.

We may add that, in the course of argument, reliance was to some extent placed on section 65 of the Indian Contract Act, but that section is of no real assistance to the plaintiff, as it relates to the obligation of a person who has received an advantage under an agreement which is discovered to be void or under a contract which becomes void. The case

(1) (1869) L. R. 4 Q. B. 309.

(2) (1890) 24 Q. B. D. 742.

(3) [1901] 1 K. B. 558.

(4) (1885) I. L. R. *0 Bom. 152.

(5) (1905) 1 C. L. J. 261.

(6) (1909) I. L. R. 33 Bom. 411.

before us is, however, not that of an agreement "discovered" to be or "becoming" void. The agreement is void on the face of it, and it was void *ab initio*, while the words of the section can only be aptly applied in such cases as that of an agreement which is subsequently found to be void on account of some latent defect or of circumstances unknown at the date of the agreement or of an agreement which is afterwards made void by circumstances which supervene.

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LAW
COULDERS
R.
Hector
Bose

The result is that the decree of the Small Cause Court Judge is affirmed and this rule discharged with costs. We assess the hearing fee at one gold mohur.

We direct that a copy of our judgment be forwarded to the District Judge with instruction to make a thorough inquiry into the allegations made by the plaintiff against the defendant who is the Nazir of the District Court. The District Judge will report to this Court, as early as practicable, the result of his investigation.

G. S.

Rule discharged.

1915

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LEDE
COACHMAN
v.
HIRALAL
BOSE.

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G. S.

Rule discharged.

1915
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LAW
COURT
S.
HINDU
B.C.

ORIGINAL CIVIL.*Before Chaudhuri J.*

1915

April 30.

BASIR ALI*v.***HAFIZ NAZIR ALI.***

Receiver—Sale by Receiver—Civil Procedure Code (Act V of 1908) O. XL, r. 1—Receiver, authority of, to sell property and execute the conveyance including share of infant defendant—Practice—Trustees Act (XV of 1886) ss 8, 20 and 32.

In a partition suit in which a Receiver is authorized to sell properties, there can be no difficulty in directing him to convey the properties. Under O. XL, r. 1 cl. (d) of the Code the Court may confer on a Receiver all such powers for the realisation of properties and the execution of documents as the owner has. The Receiver may be therefore, directed to execute a conveyance including the share of an infant defendant.

In all sales whether by the Court or under the Court or by direction of the Court out of Court, the purchaser is bound to satisfy himself of the value, quantity, and title of the thing sold, just as much as if he were purchasing the same under a private contract. The sale certificate does not transfer the title; it is evidence of the transfer.

Minatoonnessa Bibee v. Khatoonnessa Bibee (1), *Golam Hossein Cassim Ariff v. Fatima Begum* (2) and *Daris v. Ingram* (3) referred to.

THIS was a suit for partition in which some of the parties were minors. By the decree in appeal dated the 11th May 1911, it was ordered, *inter alia*, that a Receiver should be appointed of certain properties, and the Receiver was directed to sell one of the properties by private treaty or public auction, while liberty was given to the parties with one exception to

* Original Civil Suit No. 298 of 1908.

(1) (1894) I. L. R. 21 Calc. 479. (2) (1910) 16 C. W. N. 394.

(3) [1897] 1 Ch. 477.

bid at the auction. The Receiver had the property valued as directed, and on the 2nd May 1913 accepted the offer of the plaintiff. Subsequently an agreement for sale was executed and a draft conveyance was prepared, but as some of the parties to the suit were infants, the question arose as to who should approve and execute the conveyance on their behalf.

On the application of the plaintiff, an order was made by Chaudhuri J. that the Registrar of the Court should approve and execute the conveyance on behalf of the infant defendant. But when the order came before the Registrar for settlement, the question was raised whether a conveyance executed by him on behalf of the infant defendant would give a good title to the purchaser. In these circumstances, a note was prepared by the Registrar and submitted to Chaudhuri J. who passed the following order.

CHAUDHURI J. Formerly it was the practice of this Court to grant sale certificates in respect of sales by Receivers under orders of the Court. In the case of *Minatoonnessa Bibee v. Khatoonnessa Bibee* (1), Sale J. held, after a careful consideration of the earlier cases, that a sale by the Receiver was a sale by the Court. In *Golam Hossein Cassim Ariff v. Fatimi Begum* (2), Fletcher J. disallowed an application for confirmation of such a sale and for sale certificate, drawing a distinction between "sales by the Court" and "sales under the Court." Owing to this decision great difficulties have arisen and sales effected by Receivers, or Commissioners of Partition under orders of the Court have, in many instances, not yet been completed. The difficulty has been in purchasers obtaining proper conveyances. In this particular case by the decree in Appeal No. 56

(1) (1891) I. L. R. 21 Calc. 479.

(2) (1910) 16 C. W. N. 394.

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April 30.**BASIR ALI***v.***HAFIZ NAZIR ALI.***

Receiver—Sale by Receiver—Civil Procedure Code (Act V of 1908) O. XL, r. 1—Receiver, authority of, to sell property and execute the conveyance including share of infant defendant—Practice—Trustees Act (XV of 1866) ss. 8, 20 and 32.

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In all sales whether by the Court or under the Court or by direction of the Court out of Court, the purchaser is bound to satisfy himself of the value, quantity, and title of the thing sold, just as much as if he were purchasing the same under a private contract. The sale certificate does not transfer the title; it is evidence of the transfer.

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(1) (1894) I. L. R. 21 Calc. 479. (2) (1910) 16 C. W. N. 394

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(2) (1910) 16 C. W. N. 394.

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April 30.

BASIR ALI

v.

HAFIZ NAZIR ALL.*

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HARIZ
NAZIR ALI.

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following passage occurs in Trevelyan's book on Minority, 3rd Edition p. 294 "when a sale is ordered by the Court, the Court may itself execute or may direct one of its officers to execute a transfer in the name of the minor." The authority for this is given as sections 261-262 of the Civil Procedure Code, 1882, (O. XXI, r. 31 of the present Code). The Registrar correctly points out that that rule refers to a judgment-debtor who has been ordered to execute a document, but has refused or neglected to do so. It was held by Kennedy J., that the corresponding section (section 202) of the Code of 1859 did not apply to minors, and our present rule 28 Chap. 17, does not appear to be applicable. The Registrar also correctly points out that there is difficulty in applying the provisions of Chap. 28 r. 51, of our new Rules. They refer to sales by the Registrar and not to sales by Receivers. In England when a sale is ordered in a partition action for the purpose of effecting the sale, infants who are interested, are declared trustees of their shares, for the purchaser, within the meaning of the Trustees Act, 1893, and persons are appointed by the Court to convey their shares to the purchaser [see Halsbury's Laws of England Vol. 17, p. 82, and *Davis v. Ingram* (1)] where the next friend of the infant was appointed to convey. Under the Indian Trustees Act, by virtue of section 8, the High Court may make a vesting order having the effect of a conveyance with regard to property held by a minor trustee or mortgagee, and sections 20 and 32 may be used in the same way as similar sections in the English Act. The Indian Act, however, is only applicable to cases governed by the English Law. There may be certainly cases as between Hindus or Mahomedans where the

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It saves considerable costs and trouble, and I feel disposed to encourage granting such certificates. One of the grounds for refusal in *Golam Hossein Cassim Ariff's Case* (1) was, that in sales "under the Court" the Court does not make any title to the purchaser. But a sale certificate merely records an already accomplished fact, and states what has been sold. In execution sales there is no warranty by the Court that the title is good. The quantity and nature of the right and interest existing in the debtor at the time of attachment and advertisement of sale, alone pass by the sale. In mortgage suits, the right, title and interest both of the mortgagor and the mortgagee pass. In all sales whether by the Court or under the Court or by direction of the Court out of Court, the purchaser is bound to satisfy himself of the value, quantity and title of the thing sold, just as much as if he were purchasing the same under private contract. I do not see what the difference is. The sale certificate does not transfer the title. It is evidence of the transfer. But since the question is of some considerable importance, it is desirable to adopt a course which seems to me to be sanctioned by statute, and not merely to follow a practice in which there has been a break, as above stated, however recent. In this case I authorise the Receiver and direct him to execute the conveyance. I think that if this course is followed, the difficulty which I have mentioned will be avoided. Cases may arise where it may be considered expedient to follow the English procedure and apply the Indian Trustees Act where it may not be inapplicable, but it is unnecessary to deal with that question on this application. I have referred to it as the point has been raised in the Registrar's note. Sales by Commissioners of Partition

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are eventually confirmed by the Court when the final decree is made and formal conveyances may not be at all necessary. To get a guardian of an infant's property first appointed, authorising him to sell, in order to effectuate a sale in a partition action, is a dilatory and expensive procedure and should in my opinion be discouraged unless imperatively necessary.

W. M. C.

Attorney for the plaintiff: *M. M. Chatterjee.*

APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

1915

May 10.

CHAIRMAN, HOWRAH MUNICIPALITY

v.

HARIDAS DATTA.*

Municipality—Roads which rest in the Municipality—Public, when they have a right to go over private pathway—Difference between roads vested in the Municipality and others as regards Municipality's rights—Bengal Municipal Act (Beng. III of 1884), ss. 30, 31.

Under s. 30 of the Bengal Municipal Act as amended by recent legislation, private pathways do not vest in the Municipality.

Chairman of the Howrah Municipality v. Khetra Krishna Mittra (1) followed.

Kumud Barlu Das Gupta v. Kishori Lal Goswami (2), and *Kamal Kamini Debi v. Chairman, Howrah Municipality* (3) dissented from.

* Appeal from Appellate Decree, No. 2699 of 1913, against the decree of B. C. Mitra, District Judge of Hugli, dated May 10, 1913, modifying the decree of Baroda Kinkar Mukerjee, Munsif of Howrah, dated March 29, 1912.

(1) (1906) I. L. R. 33 Calc. 1290, (2) (1911) S. A. Nos. 488 and 838
1304. of 1909 (unrep.)

(3) (1909) S. A. No. 2134 of 1907 (unrep.)

The Municipality may, however, have control over such a pathway, if the public have a right to go over it, as provided for in section 31 of the Bengal Municipal Act.

The difference between roads vested in the Municipality and other roads is that in the former case the Municipality is responsible for lighting, watering, sewerage and clearing the roads, and in the other case, the Municipality has only the power of control to prevent the road from becoming a nuisance, or the rights of the public from being interfered with.

SECOND APPEAL by the defendant, the Chairman of the Municipal Commissioners of Howrah.

The plaintiffs, who are respondents in the High Court, brought this action against the Chairman of the Howrah Municipality on the allegation that the pathway described in a schedule of the plaint was a private and not a public pathway and for a perpetual injunction restraining the defendant from interfering with its exclusive user by the plaintiffs. There was previously a criminal case instituted by the plaintiffs against one of the officers of the defendant corporation for removing the fencing and pillars of the plaintiffs, but it was dismissed; and it was alleged that the municipality had been trying to make the disputed pathway a public pathway by causing reports to be submitted by their own agents as regards its width and by naming the pathway in the papers and maps existing in their records. The defendant pleaded, *inter alia*, that the disputed pathway was not a private pathway but was a road within the definition of "road" as used in the Bengal Municipal Act and was vested in the Municipality, that in the alternative it was a road under the control of the Municipality, and that the plaintiffs had no right to interfere with the statutory control of the Municipality.

The Munsif decreed the injunction prayed for, holding it to be a private pathway. The defendant appealed. The District Judge modified the findings

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of the Court of first instance. He upheld the finding as regards the plaintiff's title and held that though the pathway was a "road" over which the public might have a right of way, it did not necessarily vest in the Municipality as contemplated by section 30 of the Bengal Municipal Act. He thought it was not necessary for him to decide whether the Municipality had control over the pathway under section 31 of the Act. The injunction given by the lower Court was withdrawn.

The Chairman of the Howrah Municipality, thereupon, preferred this appeal to the High Court.

Babu Mahendranath Roy (with him *Babu Manmathanath Roy*), for the appellant. All roads over which the public have a right of way are vested in the Municipality: see Bengal Municipal Act, ss. 6 (13) and 30. The words "and all" after the word "soil," in section 30, separate the term "roads" from the parenthesis "not being private property" as noted in Collier's Bengal Municipal Manual, 6th Edition (1905) at p. 31. This is what was held by this Court in two unreported judgments in the cases of *Kumud Bandhu Das Gupta v. Kishori Lal Goswami* (1) and *Kamal Kamini Debi v. Chairman, Howrah Municipality* (2).

[FLETCHER J. But see *Chairman of the Howrah Municipality v. Khetra Krishna Mitter* (3).]

That was an *obiter*. The present question did not arise in that case. Moreover, a road over which the public have a right of way is public and not private property *qua* "road". At any rate, the road is under the control of the Municipality. The question which was raised before the Court of Appeal below has not been properly considered, and it was wrong for that

(1) (1911) S. A. Nos. 488 and 838 (2) (1909) S. A. No. 2134 of 1907
of 1909 (unrep.). (unrep.)

(3) (1906) I. L. R. 33 Calc. 1290.

Court to say that it was immaterial whether the public or any section of the public had right of way over it.

[FLETCHER J. The declaration by the Court of Appeal below ought to have been made subject to the rights of the public and the Municipality under the Act.]

Babu Pravash Chandra Mitra (with him *Babu Sushilmadhab Mallik*), for the respondents. Certain sections of the Bengal Municipal Act no doubt give control, but the word "control" which was the basis of the argument in the Court of Appeal below was used with reference to section 31 of the Act.

[FLETCHER J. No. Section 31 refers to the taking over and repair of roads. It is necessary to ascertain the position of the Municipality in respect of the road.]

FLETCHER J. This is an appeal from a decision of the learned District Judge of Hooghly, dated the 10th May, 1913, modifying the decision of the Munsif, third Court, at Howrah. The plaintiffs brought their suit against the defendant, the Chairman of the Municipal Commissioners of Howrah, for a declaration that a certain pathway was a private pathway and that the defendant Municipality had no right or control of any kind over the said pathway and further for an injunction restraining the defendant Municipality from interfering in any way with the control of the said pathway. The case obviously raised two questions. First of all, whether the pathway vested in the Municipality and, secondly, if it was not so vested, whether the Municipality had any right of control over it. Those two defences were distinctly raised in the written statement filed by the defendant Municipality. The case went for trial before the learned Munsif and

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the Munsif found that the pathway was, what he called, 'a private pathway. The case then went on appeal to the learned District Judge. The learned District Judge first of all found that the pathway was not vested in the Municipality. He raised for his own decision—and quite rightly—the question also as to whether the pathway was under the control of the Municipality as provided for by the Act. But the learned Judge refrained from deciding that question. The first question is "Is this pathway vested in the Municipality under section 30 of the Bengal Municipal Act?" That depends upon the construction of the section. The section has been amended by recent legislation and it is argued that by reason of that amendment the statute operates to vest all roads whether private or not within the limits of the Municipality. That view is supported by two unreported decisions, both by a single Judge of this Court. On the other hand, in a considered judgment of Mr. Justice Mookerjee in the case of the *Chairman of the Howrah Municipality v. Khetra Krishna Mitter* (1), the learned Judge has put what to my mind is the only possible construction of section 30. I agree with the learned Judge in the view he has expressed there as to the meaning of the section. Any other view, I think, is altogether outside the range of argument. I have no doubt that the conclusions arrived at by the learned Judge of the Court below on the facts found by him that the pathway does not vest in the Municipality, is right.

Then comes the other question. The learned Judge has not found whether the public have or have not a right to go over the pathway in question. If the public have a right to go over the private pathway, then the Municipality, under certain later sections of

the Act, have been given the power of control, the difference being that, in the case of roads vested in the Municipality, they are the body responsible for lighting, watering, sewerage and clearing the roads and, in the other case, where the road is not so vested in the Municipality, they have only the power of control to prevent the road from becoming a nuisance or the rights of the public from being interfered with. The learned Judge has failed to consider that case altogether, and he has made a declaration that this is a private pathway. It is quite clear that it is essential for the proper disposal of the case that the learned Judge should find whether this is a road within the meaning of section 6, clause (13) of the Act, that is, a road over which the public have a right to go. If they have, then the Municipality have a right of control as conferred by the later sections of the Act and any declaration or injunction that should be awarded against the Municipality in that view would be subject, of course, to the right of control conferred on the Municipality by the later sections of the Act. The learned Judge in this case has also refrained from granting an injunction. We have not had the cross-appeal opened before us. It may or may not be a proper case in which an injunction should be granted, or it may be that a declaration will satisfy all the requirements of the present case. But however that may be, the second part of the case which is an essential portion of it, namely, as to whether this is a private road not vested in the Municipality but over which the public have a right to go, and, therefore, the Municipality have a right of control under the later sections of the Act, has not been considered or decided by the learned Judge of the Lower Appellate Court. The present case must, therefore, go back to the lower Appellate Court to have the appeal decided.

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1915 by the learned District Judge. Costs will abide the result of the rehearing before the learned Judge of the Lower Appellate Court.

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RICHARDSON J. I agree.

S. M.

Case remanded.

APPELLATE CIVIL.

Before Holmrood and Walmsley JJ.

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May 17.

v.

PROTAP UDAI NATH SAHI DEO.*

Jurisdiction—Chota Nagpur Tenancy Act (Beng. VI of 1908) ss. 87, 255

261—Revenue Officer—Judicial Commissioner—Government's power to appoint the officer to hear appeals.

Section 87 of the Chota Nagpur Tenancy Act provides for a suit before a Revenue Officer and for an appeal in the prescribed manner to the prescribed officer from decisions passed under sub-section (f) that is a decision on any other matter not referred to in clauses (a) to (c). The rules made by the Government provide that suits under section 87 of the Act shall be tried in all respects as suits between the parties.

Section 264 (viii) of the Act gives the Government power to prescribe the officer to hear appeals, and the Judicial Commissioner is the prescribed officer under the rules. The provisions for appeal appear to have been overlooked in section 258 and it must, therefore, be understood that the special Appellate Court in Revenue Cases, in deciding a dispute under this Act, performs the functions of a Revenue Officer.

APPEAL by Tekait Ganesh Narain Sahi Deo, the plaintiff.

* Appeal from Original Decree, No. 27 of 1914, against the decree of Sasi Bhushan Sen, Subordinate Judge of Ranchi, dated Dec. 1, 1913, with Rule No. 109 of 1915.

The suit out of which this appeal arose was a suit for declaratory decree.

Plaintiff No. 1 is the father of plaintiff No. 2.

Pargana Baway, in the district of Ranchi, forms part of the zemindary of the defendant, the Maharaja of Chota Nagpur, and is a tenure of the plaintiff No. 1, called "Raja" by courtesy. His estate goes by the name of Barway Raj. In the last settlement proceedings, the Barway Raj was at first recorded as a heritable tenure of plaintiff No. 1, held under the defendant. Dissatisfied with the finding of the Settlement Officer, the defendant brought a suit under section 87 of the Chota Nagpur Tenancy Act for correction of the entry made by the Revenue Officer to the effect that the tenure was not a heritable one, but that at best it was merely a life-tenure of the plaintiff No. 1. The suit was dismissed by the first Court but was decreed on appeal by the Judicial Commissioner of Chota Nagpur as "the prescribed officer" under clause (2) of the above section. The matter was then brought up to this Court with the result that the second appeal was dismissed, and the High Court held that the Judicial Commissioner had full jurisdiction to decide that the plaintiff was merely a life tenant.

The plaintiffs have, therefore, brought this suit for a declaration that plaintiff No. 1 is not a life tenant of the Barway Raj and that plaintiff No. 2 is entitled to succeed to it.

Before the learned Subordinate Judge one of the contentions of the defendant was that the suit could not lie as it was barred under section 258 of the Chota Nagpur Tenancy Act or under section 11 of the Civil Procedure Code. The Subordinate Judge, agreeing with the defendant, did not think it necessary to decide the other issues and dismissed the suit. Hence this appeal.

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Dr. Dwarka Nath Mitra (with him *Babu Bipin Chunder Mallik*), for the appellant, contended that the Revenue Officer was only competent to decide certain cases specially mentioned in the Chota Nagpur Tenancy Act. The question is whether a suit to recover or to get confirmation of possession of property valued at Rs. 52,000 could be tried by the Revenue Court and whether having regard to the immense value of the property your Lordships would consider the Revenue Officer to be the ultimate Judge. Mr. Kingsford, sitting in appeal, was not a Revenue Officer and therefore section 87 had no application. Finally, the defendant No. 2 could not be affected by the suit under section 87 to which he was not a party.

Mr. Caspersz (with him *Babu Jogesh Chandra De*), for the respondent, submitted that the points raised by the learned vakil were all concluded by authority. In *Wakefield Corporation v. Cooke* (1), a whole machinery is created by a special Act by which a particular question is to be determined by a particular tribunal. There the decision is final. Further, my learned friend seeks not only to set aside the judgment of Mr. Kingsford but also the judgment of a Divisional Bench of this Court: *Raja Raghubar Sahi v. Maharaja Sri Protap Udaya Nath Sahi Deo* (2) (A. A. D. 2485 of 1911 with Rule No. 536 of 1911) decided on the 29th of Nov. 1911. There their Lordships disposed of all the arguments advanced to-day. The jurisdiction of Mr. Kingsford was recognised by the High Court, and it is idle to question it now. Mr. Kingsford had power to decide whether the tenure was hereditary or merely a tenure for life.

Cur. adv. vult.

HOLMWOOD AND WALMSLEY J.J. This appeal arises

(1) [1904] A.C. 31, 35. (2) (1911) Unreported.

out of a suit brought by the plaintiff to have it declared that the entire Pargana Barway is a hereditary, impartible estate of the family of the plaintiff and that it is descendible generation after generation in the male line of the original holder, and that the right of the second plaintiff to hereditary succession be declared.

It appears that Barway is one of six parganas, which Cuthbertson in his report states, were incorporated with the Chota Nagpur Raj on the assumption of British rule. The Maharaja has the right to receive the Government revenue, but in other respects the so-called Raja for the time being is in the position of a talukdar subject to the custom of primogeniture and impartibility.

The question of resumability by the Maharaja on the failure of direct heirs male is not dealt with by Cuthbertson, but in the revenue settlement of 1908, the final publication of which, as far as Pargana Barway is concerned, took place on the 22nd April 1909, the plaintiff No. 1 who died after this case was decided in the lower Court was entered in the record-of-rights as holding the Pargana as jagir properties descendible to children generation after generation, and the Maharaja of Chota Nagpur filed a suit under section 87 of the Chota Nagpur Tenancy Act to have this record amended and altered to life jagir, valuing his suit before the Revenue Officer at Rs. 10,000. The Revenue Officer dismissed his suit in August 1910 but, on appeal, the Judicial Commissioner, acting under the special powers conferred upon him by section 264 (viii) of the Act, decided that the tenure was not hereditary but resumable and that plaintiff's father had only obtained a life grant from the Maharaja under a written kabuliat and pattah. This was because Lal Sahi Deo, father of the plaintiff No. 1,

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Raghubar Sahi, was a very distant collateral who could only succeed on the ordinary right of survivorship under Mitakshara law, and the Judicial Commissioner held that the tenure was resumable by the Maharaja on failure of heirs male to the last Raja, and that Lal Sahi had no title outside his life grant. The matter was somewhat complicated by the intermediate holding of one Lachminath Sahi Deo who succeeded his half brother Harnath Sahi Deo and died without issue. This Lachminath has in subsequent litigation been held to be illegitimate, and the im-patible Raj governed by primogeniture is said to have become resumable on the death of Harnath who also left no heir male of his body. The late Maharaja, who was later on declared insane, neglected his estates and in litigation with the Ranis, the widows of Harnath and Lachminath Sahis, wanted to resume the tenure and joined the then holder, Lal Sahi Deo, to whom he had given a life interest, as plaintiff. He appears to have admitted the legitimacy of Lachminath for the purposes of that case as the widows of Harnath had consented to eat with Lachminath. But whether Lachminath was legitimate or not the direct male line came to an end at his death and the question before the Judicial Commissioner was whether Lal Sahi Deo had an hereditary right to the tenure or whether it was a resumable tenure held under a life grant.

Mr. Kingsford decided this question against Raghubar Sahi Deo, the son of Lal Sahi. On this suit brought by the plaintiffs Raghubar and his son Gonesh Narain plaintiff No. 2, the Subordinate Judge has held that section 258 is a bar and has dismissed the suit on that ground alone. He was asked also to hold that the decision of Mr. Kingsford operated as *res judicata* under section 11 of the Civil Procedure

Code, but he restrained from expressing any opinion on that point.

In appeal before us it is contended that section 258 has no more effect than section 109 of the Bengal Revenue Act, and that a suit to recover or to get confirmation of possession of property valued at Rs. 52,000 cannot be barred by any decision of a Revenue Court which was not competent to try such a suit. Further, it is contended that Mr. Kingsford, sitting in appeal, was not a Revenue Officer and therefore section 87 does not apply. Thirdly, that plaintiff No. 2 being no party to the suit under section 87, is not bound by it.

The answer to the first contention is that this is not a suit for recovery or confirmation of possession but a suit for a simple declaration of the nature of the tenure which is fully within the competence of the Revenue Court. Moreover, the suit, as laid, was incompetent as plaintiff No. 2 had no right to any declaration in the lifetime of his father and the suit was bad for misjoinder of causes of action. The plaintiff No. 2 has acquired his right to sue (if any) on the death of his father, but on the finding of the lower Court made in his father's lifetime he has no such right.

The second contention is based on what we must characterise as the defective drafting of the Act.

Section 87 provides for a suit before a Revenue Officer and for an appeal in the prescribed manner to the prescribed officer from decisions passed under sub-section (f) that is decisions on any other matter not referred to in clauses (a) to (e).

The Revenue Officer has power to transfer any particular case or class of cases to the Civil Court. The rules made by the Government provide that

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suits under section 87 shall be tried in all respects as civil suits between the parties.

Section 264 (viii) gives the Government power to prescribe the officer to hear appeals and the Judicial Commissioner is the prescribed officer under the rules. We are asked to hold that the Judicial Commissioner is not a Revenue Officer within the meaning of section 258 which says that no suit shall be entertained in any Court to vary, modify or set aside either directly or indirectly any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceeding under section 87. The definition of a Revenue Officer in section 3 (xxv) is any officer whom the Local Government may appoint to discharge any of the functions of a Revenue Officer under any provision of the Act. Now, the Judicial Commissioner is specially appointed under section 264 (viii) to deal with the Revenue questions decided by the inferior Revenue Officers in appeal and, therefore, comes within the definition. It would be a great anomaly to hold that the decision of the Court of appeal was open to be assailed in a suit when the first Court's decision could not be so assailed and the only alternative would be to treat the decision of the Judicial Commissioner as that of a competent Civil Court which would have the effect of raising a bar of *res judicata* under section 11 of the Code of Civil Procedure. We do not think that this could have been the intention of the Legislature. The provisions for appeal appear to have been overlooked in section 258, and we must hold that the special Appellate Court in Revenue cases is in deciding a dispute under this Act performing the functions of a Revenue Officer. We may further observe that the jurisdiction of the Judicial Commissioner to decide the question that is now sought to be agitated in this suit was decided by a Bench of this

Court on Rule No. 5366 of 1911 the judgment in which appears on page 50 of the paper book.

As regards the third contention, we think the Judge in the Court below is right. The plaintiff No. 2 had no coparcenary right in the estate which was fully represented by his father in the suit under section 87.

The plaintiff No. 2 being in possession can defend his title in the suit for resumption which is now being brought by the Maharaja of Chota Nagpur. But he cannot by suit seek to vary or set aside the order of the Revenue Courts made under section 87. No bar of *res judicata* has as yet been found against him under section 11 of the Code of Civil Procedure, but his present suit is incompetent for more than one reason.

The result is that this appeal is dismissed with costs, and the Rule to stay further proceedings in the respondent's suit for resumption is discharged with costs.

S. K. B.

Appeal dismissed.

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ORIGINAL CIVIL.*Before Amam J.*

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May 24.

PADAMSEE NARAINJEE*v.***LAKHAMSEE RAISEE.***

*Stay of Suit—Jurisdiction—Civil Procedure Code (Act V of 1908) s. 10
—Stay of proceedings in one of two suits in respect of same subject-matter in different Courts.*

A, who carried on business at Karachi and employed B. as his commission agent at Calcutta, instituted on 16th February 1915 in the Court of the Judicial Commissioner of Sind at Karachi, a suit against B. for an account and the recovery of whatever sum should be found due on the taking of such account. On 10th March 1915, B. instituted in the High Court at Calcutta the present suit against A. for the recovery of Rs. 26,665 or in the alternative an account. Thereupon, A. applied to have the present suit stayed pending the determination of his suit in the Karachi Court :—

Held, that the only question that required consideration was whether the Karachi Court has jurisdiction to grant the reliefs claimed. The plaint in the Karachi suit sets out allegations that clearly give jurisdiction to that Court to try the case. The present suit must, therefore, be stayed till the determination of the suit at Karachi.

THIS was an application by the defendants to stay proceedings under the following circumstances. Some time in 1912 the plaintiff, who carries on business as a Commission-Agent in Calcutta, agreed to be the commission agent of the defendants, a firm of general merchants at Karachi. Accordingly, the plaintiff acted as the defendant firm's commission-agent in Calcutta for about 18 months, when disputes arose between them regarding the account. On or about the 8th February 1915, the defendant firm received a letter from the plaintiff's solicitors demanding on the

plaintiff's behalf the payment of the balance of the account alleged to be due from the defendant firm to the plaintiff. On 13th February 1915, the defendant firm replied denying any indebtedness by them to the plaintiff and stating that they were about to institute proceedings in the Court of the Judicial Commissioner of Sind for the recovery of the money claimed by them to be due to them from the plaintiff. Thereafter, on 16th February 1915, the defendant firm filed a suit against the plaintiff in the Court of the Judicial Commissioner in Sind; and in this suit the defendant firm prayed that the plaintiff (in this suit) might be directed to render a full and proper account of the commission agency business and to pay to the defendant firm whatever should be found to be due to them. On 10th March 1915, the plaintiff filed a suit in the High Court at Calcutta against the defendant firm for the recovery of Rs. 26,665 or in the alternative for an account. Thereupon, the defendant firm submitted the present application in the High Court to have the present suit (being suit No. 310 of 1915) stayed pending the determination of the suit filed by the defendant firm (being Suit No. 84 of 1915) in the Court of the Judicial Commissioner in Sind.

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Mr. K. P. Basu, for the defendants, Lakhamsee Raisee and Jivraj Lakhamsee, submitted that the only question that the Court had to determine was whether the Court at Karachi had jurisdiction to grant the reliefs claimed, and that for the determination of this question it was necessary that the plaint only in that suit should be looked at, and that the statements contained in that plaint should be taken as correct for the purposes of this application. It would be inconvenient if two suits of the same subject between the same parties should be allowed to proceed in two

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different Courts at the same time. He also urged that the case was covered by section 10 of the Code of Civil Procedure (Act V of 1908).

Mr. P. R. Das, for the plaintiff, Padamsee Narainjee. Before proceedings can be stayed under section 10 of the Civil Procedure Code, the defendant must show that (i) the Court has jurisdiction; (ii) the subject-matter of the two suits is the same; and (iii) the parties are identical. The plaint in the Karachi suit clearly shows that the cause of action arose without the jurisdiction of that Court, therefore that Court is not a Court of competent jurisdiction to grant the reliefs claimed. The defendant in that suit, the plaintiff in the present suit, admittedly does not reside in the jurisdiction of the Karachi Court. The institution of proceedings in that Court by the defendant was merely a device to delay the plaintiff from recovering through this Court money due to him by the defendant firm.

Mr. S. R. Das, in reply, referred to section 10 of the Civil Procedure Code and the cases of *Balkishan v. Kishan Lal* (1) and *Meckjee Khetsee v. Kasowjee Deva Chand* (2). He also referred to the notes under section 10 in Woodroffe's Civil Procedure Code, and to Hukam Chand's Treatise on the Law of Res Judicata, pp. 239-241; and more particularly to the passage cited by Hukam Chand on p. 240 to the effect "that a great deal of trouble has arisen from the mistaken conception that jurisdiction depends upon facts, or the actual existence of matters and things, instead of upon the allegations made concerning them."

Cur. adv. vult.

IMAM J. This is an application under section 10 of the Code by the defendants for the stay of this suit

on the ground that the matters in issue are also directly and substantially in issue in a suit previously instituted by them at Karachi, the parties in that suit being the parties in this. Both the suits admittedly relate to the same contracts between the parties and the only question that requires to be considered is whether the Karachi Court has jurisdiction to grant the reliefs claimed. In the suit at Karachi the plaint sets out allegations that clearly give jurisdiction to that Court to try the case. Those allegations may be wholly untrue, but it is not for this Court to pronounce on them for the purposes of this application—jurisdiction does not depend upon actual facts but upon the allegations made concerning them. This suit, therefore, cannot be proceeded with. The suit will be stayed till the determination of the suit at Karachi. I make no order as to costs.

Attorneys for the plaintiffs : *R. M. Chatterjee & Co.*
 Attorneys for the defendants : *Leslie & Hinds.*

W. M. C.

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Cur. adv. vult.

IMAM J. This is an application under section 10 of the Code by the defendants for the stay of this suit

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IMAM J.

Attorneys for the plaintiffs : *R. M. Chatterjee & Co.*
 Attorneys for the defendants : *Leslie & Hinds.*

W. M. C.

APPELLATE CIVIL.

Before Jenkins C. J., and N. R. Chatterjea J.

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May 26.**MANI MOHAN MANDAL***v.***RAMTARAN MANDAL.***

Remand—Remand on a preliminary point—Powers of lower Appellate Court to reverse and remand—Civil Procedure Code (Act V of 1908) s. 107, sub-s. (1) cl. (b), sub-s. (2); O. XLI, r. 23.

As the body of the Code creates jurisdiction (while the rules indicate the mode in which it is to be exercised), it is expressed in more general terms, but has to be read in conjunction with the more particular provisions of the rules.

S. 107 sub-s. (1) cl. (b) of the Code is subject to the conditions and limitations prescribed by the rules, and in the case of a lower Appellate Court, the power of reversal and remand is limited to the position described in rule 23, Order XLI.

SECOND APPEAL by Mani Mohan Mandal and Upen-dra Nath Mandal and Shamdhon Mandal, heirs and legal representatives of Adwaita Mandal (deceased), and Rai Mohan Biswas, the defendants Nos. 5 and 6.

The facts connected with this case appear from the judgment passed in appeal by A. Mellor Esq., Additional District Judge of Alipore, dated 12th February 1913. The full text of the judgment is as follows:—

"This was a suit for recovery of possession of 33 bighas odd of land which was leased to plaintiff (Ramtaran Mandal) in the year 1900 by the Court of Wards, then managing the Estate of Barada Proshad Roy Chowdhury who is defendant No 8 in the suit. Plaintiff alleged that the land was in Taluk No. 333 which belongs to their landlord and that he had been

* Appeal from Appellate Decree, No. 1424 of 1913, against the decree of A Mellor, Additional District Judge of 24-Parganas, dated Feb. 12, 1913, reversing the decree of Haripada Mazumdar, Munsif of Alipur, dated Feb. 22, 1912.

dispossessed by defendants Nos. 5 and 6. The case of the principal defendant No. 8 is that the land is not in Taluk No. 333, but is in other talukas and has been leased to him by other landlords.

The learned Munsif dismissed the suit, finding that the boundaries given in the plaint include over 200 bighas of land and the land in suit has not been properly identified.

He considered that the plaintiff should have had a local enquiry made to ascertain whether the disputed land actually fell in Taluk No. 333 or not. The plaintiff has appealed and his contentions will appear from the remarks which I shall make. He says that he is a poor man and could not afford the expense of a Commission for local investigation as his landlord gave him no help in fighting the case. He thought that his evidence was sufficient to prove his case and still maintains this position.

The case is one of some hardship. There can be no doubt that the appellant got settlement of 33 bighas of land and paid rent for it. He has filed receipts granted by the Court of Wards, about which there can be no suspicion. Exhibit B proves that the Court of Wards bought up 151 bighas of land in execution of a decree against tenants. Of this area appellant took settlement of 33 bighas comprising the holdings of Paran Mandal (30 bighas) and Hatem Molla (3 bighas) odd. The landlord is admittedly in possession of 11 bighas odd, the holding of Kumu Molla, and leased out the remaining 106 bighas 4 cottas to the contesting defendant Adwanta. The latter has executed a *Labuliat* in respect of the 106 bighas acknowledging Barada Babu, as his landlord and mentioning the lease of the appellant. He admits the purchase of 151 bighas by Barada Babu. The 45 bighas situated in Taluk No. 333 comprise the 33 bighas leased to appellant and the 11 bighas occupied by the landlord himself. There can, therefore, be no doubt of appellant's title to 33 bighas and his possession is proved by his *dakhlas* and by *Labulias* executed by persons to whom he sublet parts of the holding.

It is, therefore, inequitable that he should be deprived of this land by a trespasser, because he did not consider it necessary to have a local investigation held or because he could not afford to do so. He asks this Court to allow him to remedy the defect even now and in the interests of justice, I think he should be allowed.

The decree of the lower Court is, therefore, *set aside and the case is remanded*. The Munsif will issue a commission for local investigation to determine the situation of the land and decide the exact situation of the 45 bighas of land which lie in Taluk No. 333 and which include the 3 bighas in dispute. After considering the report and taking such further evidence as he may consider necessary, he will proceed to determine the suit. Costs to abide the final result."

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The contesting defendants Nos. 5 and 6 being dissatisfied with this decision of the Additional Judge reversing that of the learned Munsif of Alipore dated 22nd February 1912 and remanding the case, preferred this second appeal to the Hon'ble High Court.

Babu Bipin Bihari Ghose (junior), for the appellants. The lower Appellate Court considered it a hard case because the plaintiff could not afford to have a local investigation to discover whether his lands fell within taluk number 333, and has directed the issue of a commission, though plaintiff maintained that his evidence was sufficient to dispose of the suit. I submit that is taking new evidence, and the case ought not to have been remanded for a local investigation: *vide* Order XLI, rule 27 of the Code of Civil Procedure.

[N. R. CHATTERJEA J. But see Order XLI, rule 28.]

Suppose the plaintiff did not choose to adduce evidence, can he now ask for additional evidence to be taken after appeal? Here the lower Appellate Court has acted under Order XLI, rule 23 and I complain that he cannot do so as the Court of first instance did not dispose of the case on a preliminary point but on the merits after discussing the whole of the evidence that the parties without any restriction placed before it. The lower Appellate Court is also not entitled to take additional evidence under Order XLI, rule 27, but that matter is not now before this Court. If the Appellate Court does take additional evidence, I have the right to appeal.

The only question that has to be considered at present is whether a lower Appellate Court has the power under Order XLI, rule 23 of reversing and remanding.

[JENKINS C.J. The Judge can hear the appeal on the merits and then he can exercise all the powers given to an Appellate Court.]

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Yes, he can.

Babu Shib Chandra Palit, for the respondent. I submit the Court has very wide powers now under Order XLI, rule 33 which is a new provision.

Rule 23 of Order XLI is not exhaustive, as clause (b) of sub-section (1) of section 107 of the Code says in general terms that an Appellate Court shall have power to remand a case. Under the circumstances this case should go back.

JENKINS C.J. This is an appeal from a decision by the lower Appellate Court. For that decision there can be no justification unless it can be brought within the terms of rule 23 of Order XLI. But that clearly cannot be done for the Court of first instance did not dispose of the case on a preliminary point but on the merits after discussing the whole of the evidence that the parties, without any restriction, placed before it.

It has been suggested before us that rule 23 is not exhaustive, and for that purpose we have been referred to section 107, sub-section (1), clause (b) of the Code where, no doubt, it is said in general terms that an Appellate Court shall have power to remand a case. But this argument overlooks the opening words of the section which provide that subject to such conditions and limitations as may be prescribed a Court shall have that power. If we turn to the definition clause we find that "prescribed" means prescribed by rules, and "rules" means rules and forms contained in the first schedule or made under section 122 or section 125. These rules provide that in the case of a lower Appellate Court the power of reversal and

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Yes, he can.

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Rule 23 of Order XLI is not exhaustive, as clause (b) of sub-section (1) of section 107 of the Code says in general terms that an Appellate Court shall have power to remand a case. Under the circumstances this case should go back.

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remand is limited to the position described in rule 23, Order XLI. And this is the general rule except under special conditions which have no application in the circumstances of this case.

I may here point out what is obvious on a perusal of the Code as a whole that the Code, consists (i) of that which is termed "the body of the Code" and (ii) of the rules.

The body of the Code is fundamental and is unalterable except by the Legislature; the rules are concerned with details and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, but it has to be read in conjunction with the more particular provisions of the rules.

In this case it appears to us that the learned Judge clearly had no authority to reverse and remand. We must, therefore, set aside his decision and direct that the case be restored to his file and that he should proceed with the hearing of the appeal according to law. When it comes before him it will be open to him to exercise all the powers that are vested in a Court of Appeal and in particular those mentioned in sub-section (2) of section 107 of the Code. What powers he should exercise in the particular circumstances of this case, it would not be right for us to indicate. But all we now do is to direct a re-hearing of the case by the lower Appellate Court.

Costs will abide the result.

N. R. CHATTERJEE J. concurred.

n. s.

Appeal allowed; case remanded.

CRIMINAL REFERENCE.

Before Chitty and Chapman JJ.

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1915

May 31.

Security for good behaviour—Person within the local limits of the Magistrate's jurisdiction—Residence—Commission of acts complained of within such local limits—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898) s. 110.

Section 110 of the Criminal Procedure Code does not require residence within the local limits of the jurisdiction of the Magistrate who institutes proceedings thereunder.

Where the habits of the persons called upon to furnish security for good behaviour were practised, and their evil reputation acquired, within the local limits of the jurisdiction of the Presidency Magistrate of the Northern Division of the town of Calcutta, though they might be occasionally residing elsewhere.—

Held, that the Magistrate was competent to take proceedings against such parties under s. 110 of the Code.

Ketahos v. Queen Empress (1) distinguished.

THE facts of the case are as follows. One Parmessur Bania was arrested in December 1914 in connection with a house-breaking case within the limits of the Jorabagan thana, in the town of Calcutta, and made a long statement implicating the six accused and others as his associates in a series of thefts and burglaries committed in the Northern Division of the town during the last two years. This information led to police action against the present accused. Mahendra Karmakar was arrested in January, in the Midnapore district, with reference to a dacoity committed at

* Criminal Reference No. 1 of 1915 by K. B. Das Gupta, Pre-idency Magistrate, Northern Division, Calcutta, dated April 7, 1915

(1) (1900) I. L. R. 27 Calc. 933.

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Serampore in the preceding month; and brought down to Calcutta in custody. The other accused were arrested at various places in the town. A proceeding under s. 110 of the Criminal Procedure Code was drawn up against them, on 11th February 1915, on a police report submitted by the Sub-Inspector of E. Town stating that they, "being found within the jurisdiction of the Presidency Magistrate, Northern Division, associated together and with other old offenders, and habitually committed house-breaking or thefts," and they were required to show cause why they should not execute a bond, each in the sum of Rs. 500, with two sureties in the like amount, to be of good behaviour for three years. Parmessur stated in his evidence that the six accused and others of the gang used to meet and plan their criminal enterprises at various houses and shops within the limits of the Jorabagan thana, and at a house in Meehua Bazar Street, and that they kept their house-breaking implements at first in Bartola Lane and then at 14, Wellington Square. His evidence was corroborated by a large number of witnesses living in the neighbourhood of those houses and shops, who also proved the general bad repute of the accused, as thieves. Each of the accused had further been previously convicted under one or the other of the following sections, 380, 411, 414, 454 and 457 of the Penal Code, or bound down under ss. 109 and 110 of the Criminal Procedure Code, and had served various terms of imprisonment down to 1912. Since their release they had committed a series of burglaries and thefts, most of them in the town of Calcutta.

It appeared that Mahendra was a native of the Midnapore district and that he claimed to have resided and carried on the business of a manufacturer of iron chests at a village in the district. But the evidence showed that he had resided in Calcutta till

the previous Agrahayan (November, December 1914) and only now and then visited the Midnapore shop. The accused Jaigopal was found to have resided in Calcutta and to have only occasionally visited the house of his mother-in-law in Sinthi near Dum Dum, and it was at places within the jurisdiction of the Presidency Magistrate of the Northern Division that he was constantly found in the company of the other accused by the prosecution witnesses. He was also arrested at one of these places.

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The Magistrate found that the accused Durga, Mahendra, Joygopal and Ganga Bishen were the most dangerous of the gang and bound them down to be of good behaviour for three years, and the others for a period of two years. He submitted the case, under s. 123 (2) of the Criminal Procedure Code, to the High Court by his order dated the 7th April 1915.

Babu Manmatha Nath Mukerjee and *Babu Prabodh Chandra Chatterjee*, for the accused. Mahendra was a native of, and resident in the Midnapore district. He was arrested there and brought down to Calcutta. Jaigopal is shewn to have been living with his mother-in-law at Sinthi. They were not resident within the Magistrate's jurisdiction, and he has no power under s. 110 to institute proceedings against them. Refers to *Ketaboi v. Queen-Empress* (1). [He then dealt with the evidence in the case].

Mr. S. R. Das and *Babu Manindra Nath Banerjee*, for the Crown. The section does not require residence within the Magistrate's jurisdiction. The acts complained of were committed within the jurisdiction, the habit acquired here, and this circumstance gives the Magistrate authority to proceed under s. 110: see *Emperor v. Bapoo Yellapu* (2).

Cur. adv. ruli.

(1) (1900) I. L. R. 27 Calc 993.

(2) (1907) 9 Bom. L. R. 244.

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Serampore in the preceding month; and brought down to Calcutta in custody. The other accused were arrested at various places in the town. A proceeding under s. 110 of the Criminal Procedure Code was drawn up against them, on 11th February 1915, on a police report submitted by the Sub-Inspector of E. Town stating that they, "being found within the jurisdiction of the Presidency Magistrate, Northern Division, associated together and with other old offenders, and habitually committed house-breaking or thefts," and they were required to show cause why they should not execute a bond, each in the sum of Rs. 500, with two sureties in the like amount, to be of good behaviour for three years. Parmessur stated in his evidence that the six accused and others of the gang used to meet and plan their criminal enterprises at various houses and shops within the limits of the Jorabagan thana, and at a house in Mechua Bazar Street, and that they kept their house-breaking implements at first in Bartola Lane and then at 14, Wellington Square. His evidence was corroborated by a large number of witnesses living in the neighbourhood of those houses and shops, who also proved the general bad repute of the accused, as thieves. Each of the accused had further been previously convicted under one or the other of the following sections, 380, 411, 414, 454 and 457 of the Penal Code, or bound down under ss. 109 and 110 of the Criminal Procedure Code, and had served various terms of imprisonment down to 1912. Since their release they had committed a series of burglaries and thefts, most of them in the town of Calcutta.

It appeared that Mahendra was a native of the Midnapore district and that he claimed to have resided and carried on the business of a manufacturer of iron chests at a village in the district. But the evidence showed that he had resided in Calcutta till

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(2) (1907) 9 Bom. L. R. 244.

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Cur. adv. ruli.

(1) (1900) I. L. R. 27 Calc. 993.

(2) (1907) 9 Bom. L. R. 244.

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Cur. adv. rult.

(1) (1900) I. L. R. 27 Calc. 993.

(2) (1907) 9 Bom. L. R. 244.

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HALWAI.

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Cur. adv. cult.

(1) (1900) 1, L. R. 27 Calc 993.

(2) (1907) 9 Bom L. R. 244.

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 HALWAI.

CHITTY AND CHAPMAN J.J. This is a reference under section 123 of the Criminal Procedure Code in the matter of six persons, Durga Halwai, Mahendra Karmakar, Jaigopal Das, Ganga Bishen, Dwarka Sukul, and Sham Lal, who have been ordered to furnish security for good behaviour, the first four for three years, and the last two for two years, respectively, under section 110 of the Criminal Procedure Code, and who have all failed to furnish such security. The case made against them is that they are all by habit house-breakers and thieves, and form part of a gang who have been operating in Calcutta during the past three years or thereabouts. On behalf of Mahendra Karmakar and Jaigopal Das it was argued that the Presidency Magistrate had no jurisdiction to take proceedings against them under section 110, because they were not within the local limits of his jurisdiction. There appears to be no force in this contention. Mahendra Karmakar may be a native of Midnapore, but it is proved that he was residing in Calcutta down to Agrahayan last. He attempted (but without success) to show that he was carrying on a shop for the manufacture and sale of iron chests in a remote village in the Midnapore district. About December 1914 he disappeared. He was arrested in January in the Midnapore district in connection with a burglary committed at Serampore in December 1914. He was brought under arrest from Serampore to be placed before the Magistrate in this case. Jaigopal was arrested in Calcutta at the shop of Kedar Bania. For him it was said that he lived at Sinthi near Dum'Dum. It appears that he used to go there to the house of his mother-in-law, and that he used a bicycle to come and go. It was argued that "within the local limits of his jurisdiction" must be read as "residing within the local limits," etc., and the case of *Ketaboi v. Queen-*

Empress(1) was cited. The remarks in that judgment must be read in connection with the particular facts of that case, which were entirely different from those before us. In none of the sections 107 to 110 does the word "residing" occur, and to read it into those sections would involve a complete alteration of their scope and effect. It was undoubtedly within the local limits of the Presidency Magistrate's jurisdiction that the habits of all these six persons, which are now complained of, were practised. and their evil reputation, if any, acquired. Of the merits of the case very little need be said. There is abundant and cogent evidence that all these six persons are habitual house-breakers and thieves. They have all been in jail, some of them once and once again for similar offences. They all last emerged from jail at various dates from October 1911 to July 1912. Since then they have been associating in Calcutta with Parmessur and Sitanath, other offenders of the same class, and have formed a regular gang for the commission of house-breaking and theft. There is evidence of no less than 14 burglaries from 1912 down to 1914 in respect of which suspicion has fallen upon them. Their reputation as thieves is firmly established by the evidence of a number of witnesses including those called for the defence. It would be difficult to imagine a case in which the application of section 110 was more necessary or proper. We accordingly confirm the order of the Presidency Magistrate, and direct that Durga Halwai, Mahendra Karmakar, Jaigopal Das and Ganga Bishun be detained in prison for three years each, and Dwarka Sukul and Sham Lal for two years each, or until within such periods they respectively give the security to the Magistrate as ordered by him. The imprisonment will in each case be rigorous.

(1) (1900) I. L. R. 27 Calc. 993.

LETTERS PATENT APPEAL.

Before Jenkins C J., and N. R. Chatterjee J.

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May 3 ;
June 4.

MAHOMED BUKTH MAJUMDAR

v.

DEWAN AJMAN REJA.*

Waif, validity of—Deference due to previous decision of High Court as authority—Res judicata—Mussalman Waif Validating Act (VI of 1913), title, preamble and s. 3, whether retrospective or prospective only—Privy Council decisions and pronouncements on Indian Legislature.

Where there had been a previous adjudication by the High Court on the invalidity of a certain *waif* based on legal grounds, (in a subsequent suit between the same parties) —

Held, that (i) ordinarily that Court should feel bound, not on the principle of *res judicata* but out of the deference which was due to a previous decision of the High Court, to follow that authority ; and (ii) that the previous conclusive decision had not been affected by the remedial operation of the Mussalman Waif Validating Act of 1913, which was not retrospective in effect but prospective only

Rabimunissa Bibi v. Shaikh Manuk Jan (1) approved

It is doubtful whether the Governor-General in Council would make a legislative pronouncement that the repeated decisions of the Privy Council were erroneous, though from its knowledge of the requirements of the country the Legislature may think that in future the law should be otherwise administered.

APPEAL by Mahomed Bukth Majumdar, the defendant No. 1.

This appeal was filed under clause 15 of the Letters

* Letters Patent Appeal No. 48 of 1914, in Appeal from Appellate Decree No. 2242 of 1911, against the decree of F. J. Jeffries, District Judge of Sylhet, dated May 25, 1911.

Patent against the judgment of Teunon J., dated 5th January 1914, which was as follows:—

"In the case out of which this appeal arises the plaintiff as heirs to one Johura Khatun claimed a certain share in certain lands, originally the property of Johura Khatun's father.

The defense was that by a deed dated 31st December 1869, the father of Johura Khatun, and father-in-law of defendant No. 1, one Dewan Nasarat Raja Saheb, had made the properties *wakf* and that by an *ekrarnama* dated 17th Jaisth 1307 (May 1900) Johura Khatun had acknowledged the validity of the *wakf* and of a *solenamah* or compromise made between the Defendant No. 1 and his mother-in-law in a certain suit on the 7th Baisakh, 1306, and by so doing and by accepting from the defendant the allowance mentioned in the *wakfnama* Johura Khatun and her heirs were estopped from questioning its validity.

The plaintiff put the defendant to proof of his statements and further asserted that in suit No. 425 of 1901 the alleged *wakfnama* had been held by the Court to be invalid and that the question was therefore *res judicata*.

Plaintiff's suit having been decreed in both the Courts below defendant No. 1 now appeals.

His contentions before me are (i) that the validity of the *wakf* is not in fact *res judicata* as between the parties to the present suit, (ii) that the *wakf* should have been held to be a valid *wakf*, and (iii) that he should have been given a further opportunity of producing evidence, that is to say of examining himself in support of the alleged *solenamah* and *ekrarnama*.

It is admitted that in suit No. 425 of 1901 the *wakf* was held to be invalid, but in that case plaintiff sued as a creditor or representative of the wife of the original owner while he is now suing as an heir of the daughter. If the decision had been in favour of the validity of the *wakf* a fresh suit would have been open to the daughter and her heirs, and it cannot therefore be contended that in the present suit it is not open to the defendant to re-agitate the question.

But in fact no evidence of the execution of the alleged *wakfnamas* has been given and the document itself has been removed from the record by the appellant and is not produced at the hearing of this appeal. It is therefore impossible for me to say that it has been proved or is valid.

With regard to the third and last contention, it may be observed that on the 20th September 1910 the suit was peremptorily fixed for final hearing on the 7th November. On the 5th November the defendant appellant applied for a further adjournment and for his examination on commission and filed with the application a certificate from an Indian medical practitioner dated 31st October to the effect that he had been treating the

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Waif, validity of—Deference due to previous decision of High Court as authority—Res judicata—Musselman Wakf Validating Act (VI of 1913), title, preamble and s. 3, whether retrospective or prospective only—Privy Council decisions and pronouncements on Indian Legislature.

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Held, that (i) ordinarily that Court should feel bound, not on the principle of *res judicata* but out of the deference which was due to a previous decision of the High Court, to follow that authority, and (ii) that the previous conclusive decision had not been affected by the remedial operation of the Musselman Wakf Validating Act of 1913, which was not retrospective in effect but prospective only

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defendant for "chronic rheumatic affections." Now from the order sheet it appears that on the 22nd August a prior application by the defendant for his examination on commission had been opposed by the plaintiff and was very properly rejected. Under the circumstances, I cannot hold that the second application not made before the 5th November though supported by a certificate dated 31st October was improperly rejected by the Courts below.

In the result this appeal fails and is dismissed with costs."

[This Letters Patent Appeal was heard by the High Court on the 3rd May 1915 when the respondents' vakil, Babu Braja Lal Chuckerbutty, desired the Court to note that he did not appear for want of instructions, and after argument the appellants' vakil asked for one month's time to produce the previous decision of the High Court regarding the invalidity of the *wakf* which he did on the 4th June 1915.]

Babu Shib Chandra Palit (with him *Babu Birendra Chandra Das*), for the appellant. This suit is one for recovery of possession of land. Both Courts decided on the question of *res judicata*. The question was whether the lands formed the subject of a valid *wakf*. The case should have been sent back for proof of its genuineness. I did not plead *res judicata* (on 4th June 1915). In *Abul Fata's Case* (1), the Privy Council held that *wakf* was invalid on the ground of smallness and remoteness of the charitable bequest.

[N. R. CHATTERJEA J. But now an Act has been passed.]

Yes. The Mussalman Wakf Validating Act (VI of 1913). Retrospective effect has been given by this Act, which may affect vested rights. The first paragraph or section lends support to my contention that the effect is retrospective.

In *Rahimunissa Bibi v. Shaikh Manik Jan* (2),

Chaudhuri J., sitting on the Original Side, says this Wakf Act has no retrospective effect. I think he is not right.

[JENKINS C.J. It is a declaratory Act.]

The Privy Council decision in *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhri* (1) was not mentioned in N. R. Chatterjea J.'s decision in *Buzlal Ghani Mia v. Adak Patari* (2).

[N. R. CHATTERJEA J. As the Privy Council has power to declare the nature of the law, all that the Legislature can say is what the law shall be in future.]

That is all I have got to say.

No one appeared for the respondent.

JENKINS C.J. This is an appeal from a judgment of Mr. Justice Teunon by whom it has been held that the lower Courts have erroneously regarded certain judgments and decrees as constituting *res judicata*. At the same time he felt that he must affirm the decree of the lower Appellate Court on the ground that the *wakfn ima* to which the decreee related was not before him and that he had no means to form an opinion as to whether or not it was a void and invalid *wakf* as the Court had decided in a previous litigation.

May 3.

We are in the same predicament. But there is another aspect of the case by which we are influenced and it is this:—From the judgment of the Munsif, it appears that the validity or invalidity of the *wakf* was a matter that came before the High Court and was a subject of adjudication in the High Court. We have been told in the course of the argument that the invalidity of the *wakf* was affirmed on legal grounds. The result then is that there is an adjudication by the High Court on the invalidity of the *wakf* which is

(1) (1894) 1 L. R. 22 Calc. 619 : (2) (1913) 17 C. W. N. 1018.

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based on legal grounds and ordinarily we should feel bound, not on the principle of *res judicata* but out of the deference which is due to a previous decision of the High Court, to follow that authority. Before finally deciding the case on that ground, we give the appellant before us an opportunity of producing the judgment of the High Court before us within a month from this date. If he fails to do so, this appeal will stand dismissed, but without any order as to costs.

[On the 4th of June 1915, the Court delivered its final judgment in the appeal].

June 4.

JENKINS C.J. We must affirm the judgment of Mr. Justice Teunon, though possibly, not precisely, on the ground which commended itself to him.

We are of opinion that the former adjudication as to the invalidity of the *wakf* is in the peculiar circumstances of this case conclusive for the purpose of the present litigation.

We have, however, been invited to take a different view of the matter out of deference to the Mussalman Wakf Validating Act of 1913. It has been contended that the remedial operation of that Act relates to the past as well as to the present and future, and that it was intended to be a declaration that the Privy Council pronouncement as to the law of *wakf* was erroneous. I do not wish to express any opinion as to the limits of the Indian Legislature's power. But I am doubtful whether the Governor-General in Council would make a legislative pronouncement that the repeated decisions of the Privy Council were erroneous, though from its knowledge of the requirements of the country the Legislature may think that in future the law should be otherwise administered. That I think is what has happened in this case. The preamble may perhaps give some colour to the

argument that the operation of the Act being retrospective as well as prospective. On the other hand the title of the Act seems, if anything, to have an opposite tendency. But both are of ambiguous value. At the same time the terms of section 3 clearly point to futurity. And this, I think, is most likely to have been in accordance with the intention of the Legislature on general consideration and also on the particular consideration to which I have alluded. This is my view of the Act and I hold, on the special circumstances of this case, that the previous conclusive decision on which the respondent is entitled to rely has not been affected by the provisions of the Act. I have the satisfaction of knowing that this is in accordance with the view of Mr. Justice Chaudhuri [*Rahimunissa Bibi v. Shaikh Manik Jan* (1)], which gives me greater confidence in the probability of this being the true view of the intention of the Legislature.

The result is that the appeal is dismissed. As there is no appearance on the part of the respondent, we dismiss the appeal without costs.

N. R. CHATTERJEA J. I agree.

G. S.

Appeal dismissed

(1) (1914) 19 C. W. N. 76.

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Before Woodroffe and Mullick JJ.

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June 4.

YAKUB ALI

v.

MEAJAN.*

Landlord and Tenant—Purchase of raiyats' interest by sole Landlord—Occupancy holding and occupancy right—Transferability—Merger under-raiyat—Notice to quit—Ejectment—Bengal Tenancy Act (VIII of 1885) as amended by Bengal Act I of 1907, ss. 22 cl. (2), 49, 85 and 167.

The raiyats of certain lands in dispute executed a mortgage of their lands and put the mortgagee in possession. Subsequently the mortgagee settled the lands with under-raiyats. The superior landlord then brought a suit for rent against his raiyats and purchased the holding at a sale for arrears of rent. Thereafter, the landlord sold the permanent raiyali to one Meajan, who, after having taken a lease from the landlord and after having redeemed the mortgage, sold the same to the present plaintiffs. The plaintiffs, thereupon, brought a suit to eject the under-raiyats.

Held that the occupancy still continued to exist after the purchase by the landlord.

Akhil Chandra Biswas v. Hasim Ali Sadagar (1) followed.

Held, also, that the landlord was able to transfer the holding to Meajan, through whom it came to the plaintiffs.

Held, also, that the under-raiyats continued to be under-raiyats and were duly served with notice to quit and must be ejected.

SECOND APPEAL by Yakub Ali and others, the plaintiffs.

The lands in dispute formed the raiyali lands of one Fakir Mahomed under a superior landlord. After

* Appeal from Appellate Decree, No. 203 of 1913, against the decree of Rajni Kanta Chatterjee, Subordinate Judge of Chittagong, dated Oct. 4, 1912, modifying the decree of Rebati Rinjin Mookerjee, Munsif of South Rangpur, dated Aug. 4, 1911.

Fakir's death his heirs mortgaged the *raiayati* lands to Ishan Chander Poddar, who subsequently obtained possession of the lands and settled the same with the predecessors of the defendants. Thereafter, the landlord brought a suit against the heirs of Fakir for arrears of rent and, in execution of the decree obtained in that suit, the lands in dispute were sold and purchased by the landlord himself, who subsequently sold the *raiayati* to Meajan. Meajan after having obtained the *etmani bandbast* in respect of the lands from the landlord, redeemed the mortgage executed in favour of Ishan. Meajan then sold his right, title and interest in the lands and the same were purchased by Anwar Ali, the predecessor of the present appellants. Anwar Ali then brought a suit for declaration for his *raiayati* and *etmani* rights and for *khas* possession against Meajan and the settled tenants, alleging that the rights of the mortgagee having passed, the settled tenants were merely under-tenants and that notice having been served upon the defendants under s. 49 of the Bengal Tenancy Act, they were not entitled to retain possession of the lands. The defendants contested that they held the lands as *raiayati* and as such were not liable to ejectment. The suit was decided, but on appeal the decision of the lower Court was reversed. The plaintiffs, thereupon, appealed to the High Court.

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Babu Prabodh Kumar Das, for the appellant. A distinction must be drawn between an occupancy holding and an occupancy right in the *raiayati* lands. The purchase of the *raiayati* by the landlord at a sale in execution of a rent decree did not bring about a merger of the occupancy holding. What became merged was the occupancy right only, the occupancy holding remaining intact: see *Ram Mohan Pal v.*

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Sheikh Kachu (1), *Jawadul Huq v. Ram Das Saha* (2) and *Miajan v. Minnat Ali* (3). The landlord had a perfect right to sell the holding and to give the purchaser a *raiayati* title. The appellants have acquired not only the purchaser's title, but also the rights of the mortgagee of the original *raiyat* by the redemption of the mortgage. They could, therefore, eject the respondents by notice under s. 49 of the Bengal Tenancy Act, as they had done. Furthermore, the defendants, other than the defendant Meajan, were in occupation of the lands as under-*raiayats* holding their tenure from the *raiyat* without a registered lease and without permission of the landlord. Such under-*raiayats* had no right to be on the land and could be ejected: see s. 85 of the Bengal Tenancy Act and *Peary Mohun Mookerjee v. Badul Chandra Bagdi* (4).

Bibu Manmatha Nath Roy, for the respondents. When the landlord purchased the interest of the tenants at the execution sale, the *raiayati* became immediately merged in the landlord. Had there been other co-sharer landlords, there would have been no merger; for the interests of the landlords and of the tenants would not have vested in the same person or persons. The Full Bench case of *Ram Mohan Pal v. Sheikh Kachu* (1) supported the contention of the respondents; see the judgments of Ghose J. at page 393 and Harington J. at page 394 where the distinction between sole landlord and co-sharer landlords was pointed out. The Full Bench case was a case of co-sharer landlords and the ruling in *Jawadul Huq v. Ram Das Saha* (2) was followed in so far as the principles there laid down applied to co-sharer land-

(1) (1905) I. L. R. 32 Calc. 386; (2) (1896) I. L. R. 24 Calc. 143.

9 C. W. N. 249. (3) (1896) I. L. R. 24 Calc. 511.

(4) (1900) I. L. R. 28 Calc. 203.

lords; see the judgment of MacLean, C.J., at page 392. In the present suit the purchase caused a merger of interests under s. 22 of the Bengal Tenancy Act and the landlord held the lands as landlord. The cases of *Girish Chandra Chowdhury v. Kedar Chandra Roy* (1) and *Ram Saran Poddar v. Mahomed Latif* (2) were also referred to.

[MULLICK J. referred to the case of *Akhil Chandra Biswas v. Hasim Ali Sadigir* (3)].

The question, that the under-*raiayats* had not been created by a registered instrument or by the consent of the landlord, did not arise in the present case. It was not raised in the Court below; on the contrary, notice under s. 49 of the Bengal Tenancy Act had been served on the respondents treating them as under-*raiayats*: see the cases of *Amirullah Mahomed v. Nazir Mahomed* (4) and *Lal Mahomed Sarkar v. Jagir Sheikh* (5). The respondents' right to the land was, therefore, valid. The original *raiayati* right having been merged in the landlord's rights immediately on his purchase, the respondents became *raiayats*. They could not have continued as under-*raiayats* as there was no intermediate tenancy. The very definition of under-*raiayat* implied the existence of an intermediate tenancy—a *raiayati*; see s. 4 of the Bengal Tenancy Act and the case of *Ram Mohan Pal v. Sheikh Kachu* (6). The relationship between the landlord and the under-*raiayats*, therefore, became that of landlord and *raiayats* by the mere fact of the purchase of the interest of the *raiayats* by the landlord. Having become *raiayats*, the respondents could not be ejected by notice under s. 49 of the Bengal Tenancy Act.

(1) (1899) I.L.R. 27 Calc. 473 (4) (1904) I.L.R. 31 Calc. 932.

(2) (1898) 3 C.W.N. 62. (5) (1909) 13 C.W.N. 913.

(3) (1913) 19 C.W.N. 246. (6) (1905) I.L.R. 32 Calc. 386 S²⁹; 9 C.W.N. 249.

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Furthermore, the respondents' rights had been considered in a suit brought by the respondent Meajan for possession. In that suit it was decided that unless and until Meajan had annulled the encumbrances under s. 167 of the Bengal Tenancy Act, Meajan could not get possession. This judgment was put in evidence by the respondents and it showed that the decision operated as res judicata. The interest of the respondents as well as that of the mortgagee were encumbrances and none of them was annulled. Therefore, on the basis of that judgment the appellants could not get possession of the lands in dispute without first annulling the encumbrances.

This appeal ought, therefore, to be dismissed.

Babu Prabodh Kumar Das was not called upon to reply.

WOODROFFE J. This appeal has been heard at very great length; but I think the appellant has established his argument. The facts are that under the landlord there was a *raiyat* of the name of Fakir Mahomed. Fakir Mahomed mortgaged the property to one Ishan Poddar who got possession. Ishan inducted the present defendants on the land. The landlord brought a suit for rent against the heirs of Fakir Mahomed and he bought up the holding at a sale for arrears of rent. The first and perhaps the main question in this appeal is, what is the effect of such purchase? Did it, as has been contended by the respondent, effect a complete merger of the holding and of the occupancy right in the landlord's right or did it, as the appellant contends, keep alive the occupancy holding though merging the occupancy right? This question has been discussed in the case of *Akil Chandra Biswas v. Hasan Ali Sadagar* (1).

where a distinction is drawn between an occupancy holding and an occupancy right. I should state here that this case has been decided on the old law as it existed prior to 1907. Following the principle enunciated in the decision to which I have just referred, I would hold that the occupancy holding still continued to exist even after the purchase by the landlord. The landlord then sold to one Meajan the permanent *raiayati*-right. Meajan also took a lease from the landlord and the plaintiff has bought from Meajan and was now desirous to eject the defendant who had been inducted into possession, as stated.

The first Court held that he was entitled to a decree. This decision was reversed on appeal. For the reasons I have stated, the landlord was able to transfer the holding to Meajan through whom it came to the plaintiffs. The defendants continued to be what he was an under-*raiayat*, and it has been found that he has been duly served with notice. The learned Judge has referred at the conclusion of his judgment to section 167. In my opinion this does not stand in the way. A further question was sought to be argued, and that is this:—That in the suit to which Meajan was a party it was held that he could not get possession except by proceeding under s. 167. This question is not a point which has been either raised or dealt with in the judgment under appeal and therefore cannot be entertained now. The defendants having been duly served with notice to quit must be ejected.

I therefore would allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore those of the first Court with costs of this Court and of the lower Appellate Court:

MULLICK J. I agree.

O. M.

Appeal allowed.

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Babu Prabodh Kumar Das was not called upon to reply.

WOODROFFE J. This appeal has been heard at very great length; but I think the appellant has established his argument. The facts are that under the landlord there was a *raiyat* of the name of Fakir Mahomed. Fakir Mahomed mortgaged the property to one Ishan Poddar who got possession. Ishan inducted the present defendants on the land. The landlord brought a suit for rent against the heirs of Fakir Mahomed and he bought up the holding at a sale for arrears of rent. The first and perhaps the main question in this appeal is, what is the effect of such purchase? Did it, as has been contended by the respondent, effect a complete merger of the holding and of the occupancy right in the landlord's right or did it, as the appellant contends, keep alive the occupancy holding though merging the occupancy right? This question has been discussed in the case of *Akil Chandra Biswas v. Hasan Ali Sadagar* (I).

where a distinction is drawn between an occupancy holding and an occupancy right. I should state here that this case has been decided on the old law as it existed prior to 1907. Following the principle enunciated in the decision to which I have just referred, I would hold that the occupancy holding still continued to exist even after the purchase by the landlord. The landlord then sold to one Meajan the permanent *raiyati*-right. Meajan also took a lease from the landlord and the plaintiff has bought from Meajan and was now desirous to eject the defendant who had been inducted into possession, as stated.

The first Court held that he was entitled to a decree. This decision was reversed on appeal. For the reasons I have stated, the landlord was able to transfer the holding to Meajan through whom it came to the plaintiffs. The defendants continued to be what he was an under-*raiyat*, and it has been found that he has been duly served with notice. The learned Judge has referred at the conclusion of his judgment to section 167. In my opinion this does not stand in the way. A further question was sought to be argued, and that is this:—That in the suit to which Meajan was a party it was held that he could not get possession except by proceeding under s. 167. This question is not a point which has been either raised or dealt with in the judgment under appeal and therefore cannot be entertained now. The defendants having been duly served with notice to quit must be ejected.

I therefore would allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore those of the first Court with costs of this Court and of the lower Appellate Court.

MULLICK J. I agree.

O. M.

Appeal allowed.

APPELLATE CIVIL.

Before Jenkins C.J., and N. R. Chatterjee J.

1915

June 9

HIRANMOY KUMAR SAHA

v.

RAMJAN ALI DEWAN.*

Rent Decree—Evidence—Previous ex parte rent decree, admissibility of, as evidence of relationship between parties—Presumption of continuance thereof—Evidence Act (I of 1872), s. 114, illus. (d).

A previous *ex parte* rent decree (between the same parties) is not merely an item of evidence, but is conclusive as to the relationship between the parties at that time. Its value becomes more apparent since the terms of s. 114, illus. (d) of the Evidence Act permit the Court to make a presumption as to the continuance of the state of things.

SECOND Appeal by Hiranmoy Kumar Saha, minor, by his mother and next friend, Urmila Sundari Dassi, the plaintiff.

This appeal arose out of a suit instituted by the plaintiff in the Court of the Munsif of Kalna for recovery of his share of *jama* of Rs. 12-7-8*g.* with cess and damages being arrears for the years 1908 to 1911. Ramjan Ali Dewan, defendant No. 1, alone contested plaintiff's claim denying the relationship of landlord and tenant. The only evidence adduced by the plaintiff was an *ex parte* decree against defendant No. 1 in respect of the disputed *jama*. There was no evidence whether the decree was executed. On the 30th May 1912, the learned Munsif of Kalna decreed

* Appeal from Appellate Decree, No. 1563 of 1913, against the decree of Debendra Bijoy Bose, Subordinate Judge of Burdwan, dated Feb. 21, 1913, affirming the decree of Benode Behari Mukerjee, Munsif of Kalna, dated May 30, 1912.

plaintiff's suit *ex parte* against defendants Nos. 2 and 3, but dismissed it on contest against defendant No. 1, holding that plaintiff had not been able to prove his case against him. On the 21st February 1913, the learned Subordinate Judge of Burdwan dismissed the appeal filed by the plaintiff holding that the *ex parte* decree was not *res judicata* and not admissible in evidence to prove relationship of landlord and tenant. Thereupon, the plaintiff preferred this second appeal to the High Court.

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R.
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Babu Khirode Narain Bhuiya, for the appellant. The previous *ex parte* rent decree operates as *res judicata* regarding the relationship of landlord and tenant between the parties; and the Courts below are wrong in holding otherwise and treating it as no evidence. I submit that it is admissible in evidence. See *Raj Kumar Roy v. Alimuddi* (1) in which it is further held that a presumption arises in a subsequent suit that the same relationship continued till the contrary was shown.

Babu Debendra Nath Bagchi, for the respondent. A claim for rent is a continuing or recurring cause of action, and even if an unexecuted *ex parte* decree operates as *res judicata* regarding the relationship of landlord and tenant between the parties at the time to which the previous suit referred, surely it is not so in a suit for rent for a subsequent period. The facts in *Raj Kumar's Case* (1) are distinguishable, as there the presumption as to the continuance of relationship as landlord and tenant was acted upon because the previous *ex parte* decree was based upon the consideration of a *kabuliyat* while there is none in the present case.

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HIBANMOY
KUMAR SAHARAMJAN ALI
DEWAN.

JENKINS C.J., AND N. R. CHATTERJEE J. This is a suit for arrears of rent. It was necessary for the plaintiff to establish that he was the defendant's landlord. He proposed to do that by utilizing among other things a decree for rent which he had obtained in a prior suit against these defendants. The lower Appellate Court has rejected the decree as an item of evidence, apparently on the ground that it was *ex parte*. This is manifestly erroneous. The decree is not merely an item of evidence, but is conclusive as to the relationship between the parties at the time to which the previous suit referred. That does not mean that in the circumstances of this case it is conclusive as to the present relation between the parties. But it is good and valuable evidence in so far as it establishes the relationship at a time that has passed. Its value becomes more apparent when the terms of section 111 of the Evidence Act and illustration (d) are borne in mind which do not compel, but certainly permit, the Court to make a presumption as to the continuance of the state of things. The decree has been excluded from consideration by the lower Appellate Court in error.

We must, therefore, reverse the decree of the lower Appellate Court, and send back the case in order that it may be determined according to law. Costs hitherto incurred will abide the result.

G. S.

Appeal allowed; case remanded.

CRIMINAL REVISION.*Before Chapman and Walmaley JJ.***GANGADHAR PRADHAN***v.*

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Aug. 17.

EMPEROR.*

False Information—Information to the police reported false—Subsequent petition to the Magistrate impugning the report and praying for trial—Complaint—Proper procedure—Reference of complaint to another Magistrate for inquiry and report, legality of—Power of latter to hold inquiry and direct prosecution of informant for offences under ss 182 and 211 of the Penal Code—Jurisdiction of referring Magistrate to try such charges on the police report without previous disposal of the complaint—Discretion—Prejudice—Criminal Procedure Code (Act V of 1898) ss 192, 200 to 203, 476, 537

A petition impugning the police report, and praying that the accused be placed on trial is a "complaint" under the Criminal Procedure Code.

When such a petition is presented to a Subdivisional Magistrate he should, therefore, either examine the complainant himself, record reasons for distrusting its truth, hold an inquiry personally, and then pass a formal order of dismissal or he should make it over to another Magistrate for disposal. The latter may then, after inquiry, make a proper order dismissing the complaint and pass an order under s. 476 of the Code.

The Code does not permit a Magistrate to refer a complaint to another Magistrate for inquiry and report, and the latter has no jurisdiction in such a case to pass an order under s. 476.

Where in such a case the police have reported the information as false, and have asked for a prosecution, the Magistrate has jurisdiction to try the charge on the police report.

Queen-Empress v. Sham Lall (1) referred to.

There is no statutory provision requiring such petition to be finally disposed of as a complaint before a prosecution under s. 211 of the Penal

* Criminal Revision No. 877 of 1915 against the order of H. Allanson, Sessions Judge of Cuttack, dated May 25, 1915.

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Code commences. It is a matter of discretion, and the High Court will not, having regard to s. 537 of the Code, interfere with a conviction if the accused has not been prejudiced.

The facts of the case are as follows. On the 24th December 1914, the petitioner, Gangadhar Pradhan, laid an information at the Kendrapara thana, alleging that he was informed that a burglary had been committed in his house, the night previous, during his absence from home, and that he suspected certain persons named. On the morning of the 25th the Sub-Inspector proceeded to the petitioner's village and searched the houses of the suspects. He then held an investigation and submitted a report, dated the 30th, to the Subdivisional Officer stating that the case was maliciously false, and recommending the prosecution of the petitioner under ss. 182 and 211 of the Penal Code. Thereupon, the Subdivisional Magistrate called for a further report from the police on the question of the petitioner's motive, and the same was sent in on the 21st January 1915 confirming the previous report. On the latter date the petitioner filed a petition before the Magistrate impugning the correctness of the police reports and praying for judicial inquiry and subsequent trial of the suspects. The Magistrate thereupon passed the following order, without examining the petitioner:—

"To Babu J. N. Mitra, Sub-Deputy Magistrate, for inquiry and report. After considering the police reports and the other evidence adduced in Court, if he agrees in the view taken by the police, he may submit a proceeding under s. 476 to this Court for the prosecution of the complainant under s. 211, I. P. C."

The Sub-Deputy Magistrate examined the petitioner and his witnesses in Court, and also held a local investigation, and thereafter drew up a proceeding under s. 476 of the Criminal Procedure Code against the petitioner and submitted it to the Sub-

divisional Officer with a report that the case was false. On receipt of the record, the latter, without formally dismissing the petition of the 21st January, issued a warrant against the petitioner under ss. 182 and 211 of the Penal Code and proceeded to try him thereunder. He convicted the petitioner, on the 10th May 1915, and sentenced him to six months' rigorous imprisonment. An appeal against the order of conviction was dismissed by the Sessions Judge of Cuttack, on the 25th May, and the petitioner thereupon moved the High Court and obtained the present rule.

Babu Biswanath Bose and Babu Dharendra Nath Dutt, for the petitioner.

Mr. S. Ahmed, for the Crown.

Cur. adv. vult.

CHAPMAN AND WALMSLEY JJ. The petitioner laid an information at a police station to the effect that his house had been broken into at night. The police investigated and reported that the charge was false. They requested that the petitioner be prosecuted under section 182 of the Indian Penal Code. The report was received by the Subdivisional Magistrate. Upon the same date the Subdivisional Magistrate received a petition from the petitioner impugning the police report, and asking that the persons whom he accused should be put on their trial. The Subdivisional Magistrate referred this petition to a Sub-Deputy Magistrate for inquiry and report, intimating that, if the Sub-Deputy Magistrate agreed with the view taken of the case by the police, he might submit a proceeding under section 476 of the Code of Criminal Procedure to the Subdivisional Magistrate for prosecution of the petitioner under section 211 of the Indian Penal Code. The Sub Deputy Magistrate examined the petitioner

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and his witnesses and held a local investigation. He also examined the police officer. He reported that the charge was false, and submitted a proceeding under section 476, for the prosecution of the petitioner under section 182 and section 211 of the Indian Penal Code, to the Subdivisional Magistrate. The Subdivisional Magistrate directed that the case should be entered as false. The Subdivisional Magistrate thereupon tried the petitioner upon charges under sections 182 and 211 of the Indian Penal Code. The trial ended in conviction.

It has been held by this Court that a petition such as that presented by the petitioner to the Subdivisional Magistrate is a complaint. The latter should, therefore, either have made over the complaint to the Sub-Deputy Magistrate (*not for inquiry and report but for disposal*) or he should have examined the complainant himself, recorded reasons for distrusting the truth of the complaint, held the enquiry himself and then himself passed a formal order dismissing the complaint. The important points to notice are, *first*, that such a petition should always be treated as a complaint; and, *secondly*, that the petition should not be referred to another Magistrate for inquiry and report. If sent to another Magistrate, it must be sent for disposal. The other Magistrate can then, after inquiry and making a proper order dismissing the complaint, pass an order under section 476. The Code does not permit a Magistrate to refer a complaint to another Magistrate for inquiry and report. An order under section 476 made by the other Magistrate in such a case would be without jurisdiction. We have been somewhat particular in setting out the above details because the law on the subject is very imperfectly understood. In most subdivisions the magisterial staff consists of a Subdivisional Magistrate and a Sub-

Deputy Magistrate, and it is not unnatural that the Subdivisional Magistrate, knowing that he will have to try the charges under sections 182 and 211 himself, should send the case in the first instance to the Sub-Deputy Magistrate for inquiry and report. The motive is not improper but the procedure does not have the sanction of the Code, and it frequently gives rise to legal difficulties.

It has been held, however, by a Full Bench of this Court, in the case of *Queen-Empress v. Sham Lall* (1), that in such a case the Subdivisional Magistrate derives his jurisdiction to try the charge under section 211 not only from the order, if any, under section 176 but also from the police report. There can be no doubt, therefore, that the trial was with jurisdiction.

The Subdivisional Magistrate would have exercised a better discretion if he had acted in the manner which we have indicated above. But it is a matter of discretion not of statutory provision. There is no statutory provision requiring that such a petition shall be finally disposed of as a complaint before the prosecution under section 211 commences. Now after conviction a breach even of a statutory provision can be remedied by the application of section 537 of the Code of Criminal Procedure which says that, subject to the provisions of the Code, no sentence shall be reversed on revision on account of any error, omission or irregularity in the proceedings before trial, unless a failure of justice has *in fact* been occasioned. The words "in fact" have at the last amendment been added to the section to emphasize the reality of this requirement. We are quite unable to say that any failure of justice has in fact been occasioned in the present case. The rule is discharged.

E. H. M.

Rule discharged.

(1) 1887 I.L.R. 14 Cal. 75.

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APPELLATE CIVIL.

Before Moo'erjee and Roe JJ.

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May 18.

JANAKI NATH HORE

v.

PRABHASINI DASEE.*

Appeal—Review—Civil Procedure Code (Act V of 1908) O XLI, r. 11; O. XLVII, r. 4—Notice of review to respondents, if necessary—“Opposite party”—Grounds of appeal, if restricted, on review—Bengal Tenancy Act (VIII of 1885), ss. 85, 159, 161—Sale in execution of a decree under Chap. XIV of that Act—Purchase by a stranger—Meaning of “encumbrances” in s. 161 of the Bengal Tenancy Act.

Where an appeal was summarily dismissed by a Divisional Bench of this Court and such order was ultimately set aside on review by the said Bench on an *ex parte* application without notice to the respondents :—

Held, that the last order was valid even in the absence of such notice.

Joy Kumar Dutt Jha v. Eshree Nand Dutt Jha (1), *Haladhar Jha v. Syed Shah Mahomed* (2) followed.

Atdul Hakim Chondhury v. Hem Chandra Das (3) dissented from.

The expression “opposite party” in O. XLVII, r. 4 of the Civil Procedure Code means the party interested to support the order sought to be vacated or modified upon the application for review.

After an appeal is allowed under O. XLI, r. 12, after review, the appellants are not restricted to the single ground for appeal which was the basis for review, but the whole appeal is before the Court when the case is taken up for final disposal.

* *Lukhi Narain v. Srs. Ram Chandra* (4) followed.

The rights of a stranger who purchases at a sale in execution of a decree under Chapter XIV of the Bengal Tenancy Act, are regulated by s. 159 and not by s. 85 of that Act.

* Appeal from Appellate Decree, No. 2491 of 1913, against the decree of G. B. Mumford, District Judge of Faridpur, dated June 14, 1913, modifying the decree of Lal Behari Chatterjee, Munsif of Goalundo, dated May 26, 1912.

(1) (1872) 18 W. R. 475.

(3) (1914) I. L. R. 42 Calc. 433.

(2) (1914) 25 Ind. Cas. 880

(4) (1911) 15 C. W. N. 921.

The word "encumbrances" in s. 161 of that Act includes the interests of an under-*raiyat*.

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SECOND APPEAL by Janaki Nath Hore and another, the defendants.

At a sale for arrears of rent two non-transferable *raiyati* holdings, bearing *jams* of Rs. 6-2 and Rs. 2-8, belonging to one Aruna Kanta Chanda were purchased by the predecessor in interest of the plaintiff and the defendant No. 1 respectively. The plaintiff sued for declaration of title and recovery of possession with *wasilat* with respect to 8 plots of land which, he alleged, belonged to the *jama* of Rs. 6-2. Seven of these plots were found to appertain to the latter *jama*, the remaining plot being found to belong to the defendant No. 1. It was also found that Aruna Kanta had executed a potta purporting to grant a *kaimi* tenancy in favour of defendant No. 1 with regard to these seven plots. The suit was dismissed in the Munsif's Court, but the lower Appellate Court allowed the appeal in part, declaring the plaintiff's title to the seven plots and ordering that she should recover khas possession with *wasilat* to be determined hereafter. Against this decision the defendants appealed. The appeal was lodged in this Court on the 31st July 1913. On the 1st December 1913, the appeal was summarily dismissed by Carnduff and Richardson JJ. On the 28th February, an application was made for the review of this order. This application was heard on the 8th of April *ex parte*, the previous order of dismissal was vacated and the appeal ordered to be heard. The respondents urged two preliminary objections against the validity of this order, on the grounds that they had no notice of the application for review and that the appellants should be restricted to the single ground upon which the review was based.

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Babu Kishori Lal Sankar (with him *Babu Bipin Behary Ghose* and *Babu Harish Chandra Roy*), for the appellants, submitted that with regard to the preliminary objection about want of notice, reference should be made to *Joy Kumar Dutt Jha v. Eshree Nand Dutt Jha* (1). This procedure has been followed practically uniformly in this Court for the last 40 years : see also *Haladhar Jha v. Syed Shah Mahomed* (2). Regarding the second objection, the fact that it has been granted in part in some cases after review or that it depends upon the circumstances whether a part or the whole of the appeal would have to be dealt with, does not bar the power of this Court to consider the appeal as a whole. With reference to the merits, the lower Court mistakenly based its decision on the ground that the land was an occupancy holding and hence Aruna had no right to grant a sub-lease. But the appellants were in possession from a time previous to the sub-lease and hence should be considered as under-riayats. Besides the plaintiffs cannot claim the rights of a landlord and hence sub-section (1) of section 85 of the Bengal Tenancy Act will not apply. He is a stranger purchaser and will have to annul the encumbrances : see s. 159, Bengal Tenancy Act.

Babu Hira Lal Sanyal, Babu Purendu Sundar Banerjee and *Babu Amarendra Nath Bose*, for the respondents, contended that the review order was bad for want of notice : see *Muhammad Zahiruddin v. Nuruddin* (3). We are the opposite party : *Abdul Hakim v. Hem Chandra* (4). There is an analogy between an *ex parte* order granting review and an *ex parte* order allowing an appeal though filed beyond the period of limitation. Besides, the appellants should be restricted to the single ground upon which review was granted :

(1) (1872) 18 W. R. 175.

(2) (1914) Ind. Cas. 880

(3) (1903) 14 Mad. L. J. 7

(4) (1914) I. L. R. 42 Calc. 433

Bhubanessur Koer v. Ajodhya Singh(1) and *Sadaruddin v. Ekramuddin*(2). Regarding the merits, Aruna's sub-lease was void as contravening s. 85 of the Bengal Tenancy Act, he being merely an occupancy tenant and there being no registered lease: *Jarip Khan v. Dorfa Bewa* (3) and *Telam Pramanik v. Adu Sheikh*(4). We are in the position of landlords and hence we need not annul the interests of under-raliyats. S. 85(1) of the Bengal Tenancy Act will govern our case: *Peary Mohun v. Badul Chandra*(5), *Gangadhar Mondal v. Rajendra Nath Ghosh*(6), and *Ashutosh v. Banomali* (7).

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JANAKINATH HOBHPRAHBASIVIDASEK.

MOKERJEE AND ROE JJ. This is an appeal by the defendants in a suit for possession of land upon declaration of title by purchase at an execution sale and for mesne profits. The Court of first instance dismissed the suit; upon appeal, the District Judge has reversed that decision and has made a decree for ejection in respect of the first seven parcels of land. On the present appeal the propriety of the decision of the District Judge has been assailed as erroneous in law. But before we deal with the questions which arise in the appeal, we have to examine two preliminary objections taken on behalf of the plaintiff respondent.

The appeal was lodged in this Court on the 31st July 1913. On the 1st December 1913 the appeal was summarily dismissed under rule 11, Order XL1 of the Code by Carnduff and Richardson JJ. On the 28th February 1914, an application was made by the appellants for a review of this order. The application was heard *ex parte* on the 8th April 1914. The result

(1)(1911) 15 C. L. J. 339

(4)(1913) 17 C. W. N. 468

(2)(1913) 19 C. L. J. 225

(5)(1910) 1. L. R. 28 (cal.) 245

(6)(1912) 17 C. W. N. 59

(6)(1913) 17 C. W. N. 860

(7)(1913) 19 C. W. N. 412 18 C. L. J. 252

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was that the previous order of dismissal was recalled and an order was made to the following effect : "The appeal will be heard. Let the record be sent for and issue the usual notice." On behalf of the respondent, two objections have been urged against the validity of this order, namely, *first*, that it is inoperative because made in contravention of rule 4 of Order XLVII of the Code, which requires that no application for review shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and, *secondly*, that if the order be assumed to have been properly made without notice, the appellants are restricted to the single ground upon which the application for review was based. In our opinion, there is no substance in either of these contentions.

As regards the first objection, it need not be disputed, to use the language of Lord Macnaghten in the case of *Muhamed Zahiruddin v. Nuruddin* (1) that as a general rule, no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed. But the substantial question is, who is the "opposite party" upon whom notice of the application should have been served in this case. The expression "opposite party" is not defined in the Code, but it may be taken to mean the party interested to support the order sought to be vacated or modified upon the application for review. Now, what was the order in the present case which was sought to be recalled by the appellants and what was the order which they endeavoured to get substituted in lieu thereof? The order which they prayed might be recalled was to the effect that the appeal be summarily dismissed; and the order

which they wished to have substituted in its place was that notice of the appeal be served upon the respondent and that the appeal be heard on the merits after the record had been received. Can it be contended reasonably that the respondent was the "opposite party" within the meaning of the expression in the proviso to rule 4 of Order XLVII, that he was in fact interested to appear and support the order of summary dismissal, when the only order sought to be substituted therefor was that the appeal be heard in his presence? In our opinion, the question must be answered in the negative. If we acceded to the contention of the respondent, the result would be that he would be subjected to needless harassment from which the Legislature intended to protect him by the introduction of rule 11, Order XLI of the Code. If it is obligatory upon the Court to issue notice upon the respondent when an application is made to review an order of dismissal under rule 11 of Order XLI, the respondent must appear in answer to the rule to support the order of dismissal, without the record before the Court; and if the rule is made absolute and the appeal directed to be heard in the presence of the respondent, he would have to appear a second time to support the decree under appeal. This result could never have been intended by the Legislature. The view we take is in accord with that adopted in *Joy Kumar Dutt Jha v. Esharee Nund Dutt Jha* (1), where it was ruled that an application for review of an order of dismissal under section 25 of Act XXIII of 1861, which corresponds to rule 11 of Order XLI of the present Code, could be granted without the issue of any notice to the respondent. That procedure has been followed in numerous cases in this Court during the last 10 years, though we are informed that latterly

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in one or two solitary instances, amongst which may be mentioned *Abdul Hakim v. Hem Chandra* (1), the view has been taken that notice of the application for review should be issued upon the respondent. We are clearly of opinion that what has been the practice of the Court for a long series of years is in conformity with the law and that we should not depart from it. We may further point out that if the objection urged by the respondent were well founded, we could not give effect to it, for as was pointed out in the case of *Haladhar Jha v. Syed Shah Mahomed* (2) where a similar objection was unsuccessfully taken, the point must be urged before the Division Bench which granted the review; it is that Bench alone which can consider the propriety of the order previously made and either maintain or vacate the original order of dismissal. The respondent has made a faint attempt to develop an analogy between an *ex parte* order granting a review and an *ex parte* order directing that an appeal be registered though filed beyond the period of limitation or on a memorandum insufficiently stamped; on this basis, it has been argued that in the former precisely as in the latter class of cases, the respondent is not bound by the order made in his absence and is competent to question its validity when the appeal is called on for final disposal in his presence. But, plainly there is no real analogy between the two classes of cases. It cannot be maintained for a moment that the order in the present case was made without jurisdiction and we are not prepared to adopt the view indicated in *Abdul v. Hem Chandra* (1) that the order made without notice is a nullity. Even if the contention of the respondents that notice is essential is well-founded, it shows at best that the order has been made irregularly or with material irregularity in the exercise

of the jurisdiction possessed by the Judges who granted the review. That order, consequently, can neither be ignored nor vacated by us. But it is not necessary to deal with this aspect of the case in fuller detail, because in our opinion the order was properly made, though notice of the application for review was not served on the respondent.

As regards the second objection that the appeal should be restricted to the single ground which was made, the basis of the application for review, we are of opinion that it is entirely unfounded. No doubt, it was ruled by the Court in *Bhubaneswari Koer v. Ajodhya Singh* (1), that an application for review may be granted in part; and as pointed out in *Sadaruddin v. Ekramuddin* (2), whether the entire case is or is not reopened when a review has been granted, must depend upon the circumstances of each individual case. But it is plain that in this case the entire appeal is open because, as was pointed out in *Lukhi Narain v. Ram Chandra* (3), when an appeal is admitted under rule 12 of Order XLI of the Code, the appeal cannot be restricted to one or more grounds specified in the memorandum of appeal, the whole appeal is before the Court when the case is taken up for final disposal. We hold accordingly that all the grounds taken in the memorandum of appeal may be considered by us.

We now turn to the merits of the appeal. The case was argued in the Courts below on the assumption that the land in dispute constituted an occupancy holding of one Arun Kanta Chunder who granted a permanent sub-lease on the 3rd December 1899, to the first defendant. The case for the defendant is that at the time when this sub-lease was granted, he was

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(1) (1911) 15 C. L. J. 319.

(2) (1913) 19 C. L. J. 225.

(3) (1911) 15 C. W. N. 921.

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already in occupation as a tenant, and that the sub-lease did not create any new tenancy. This sub-lease contravened the provisions of section 85 of the Bengal Tenancy Act, as it created a term exceeding 9 years and would not have been admitted to registration, if it had been stated in the document that the grantor was an occupancy raiyat. But the title of the defendant does not depend upon the sub-lease. He has been in possession from a period antecedent to the lease upon payment of rent to his grantor, and has thus acquired the status of at least an under-raiyat. The question is, whether the plaintiff is entitled to eject him.

The plaintiff purchased the holding at a sale held in execution of a decree for arrears of rent on the 21st January 1901, and instituted this suit on the 4th December 1911, to eject the defendant as a trespasser. It is plain that there is no room here for the application of the principle recognized in *Manik Borai v. Bani Ch. Mandal* (1) and *Arzib Ali v. Richimuddi* (2), namely, that when a person has granted a lease on the allegation that he had such interest as entitled him to create a valid lease in favour of the grantee, the doctrine of estoppel operates between the grantor and grantee; in other words, that it is not competent to the grantor to show that the recitals in the document as to his status are incorrect and that on the true state of facts, he had no authority to create the lease. Here the question does not arise between the grantor and the grantee, and the sub-lease is consequently liable to be attacked as void, on the principle explained in *Jarip Khan v. Dorfa Bewa* (3) and *Telam Paramanik v. Adu Sheikh* (4). The plaintiff is a purchaser at a sale held in execution of a decree for arrears of rent and we have to investigate his

(1) (1910) 13 C. L. J. 649

(3) (1912) 17 C. W. N. 59.

(2) (1911) 13 C. L. J. 656.

(4) (1913) 17 C. W. N. 468.

rights and privileges. In this connection our attention has been invited to two classes of cases, where two distinct principles have been recognised. In the first class of cases, namely, in *Amirullah v. Nazir* (1), and *Lal Mahomed v. Jagir Sheikh* (2), the doctrine was recognised that the landlord of an occupancy raiyat, who has purchased the interest of the raiyat and is thus brought into direct contact with the under-raiyat inducted on the land by the occupancy raiyat, cannot, in view of the provisions of section 22 of the Bengal Tenancy Act, seek the benefit of sub-section (1) of section 85 which provides that if a raiyat sublets otherwise than by a registered lease, the sub-lease shall not be valid against the landlord, unless made with the landlord's consent. In the second class of cases, namely, *Peary Mohun Mookerjee v. Badul Chandra Bagdi* (3), *Gangadhar Mondal v. Rajendra Nath Ghosh* (4) and *Ashutosh v. Banomali* (5), the principle is enunciated that when a landlord purchases the occupancy holding at a sale in execution of a decree for arrears of rent, it is not necessary for him to annul the interest of the under-raiyat as an encumbrance, because it is an interest which is not valid against him by virtue of sub-section (1) of section 85. The case before us is not covered by either of these two principles. We have not here to deal with the case of a landlord who has purchased by private alienation or at a sale held in execution of a decree for arrears of rent. We have to investigate the case of a stranger who has purchased at a sale held in execution of a decree under Chapter XIV of the Bengal Tenancy Act. His rights are clearly regulated by the provisions of that chapter. Section

(1) (1907) I. L. R. 34 Calc. 104.

(4) (1913) 17 C. W. N. 850.

(2) (1902) 13 C. W. N. 913

(5) (1913) 19 C. W. N. 412;

(3) (1910) I. L. R. 28 Calc. 205.

16 C. L. J. 252.

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159 provides that where a holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as 'protected interest' but with power to annul the interests defined as "encumbrances." Section 160 defines "protected interests." Section 161 defines the term 'encumbrance' to mean a lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein and not being a protected interest as defined in section 160. The sale in this case was held under Chapter XIV, and, consequently, must be deemed to authorise the purchaser to annul all encumbrances mentioned in section 161. But the plaintiff contends that as he is a purchaser at the instance of the landlord, he is the landlord within the meaning of section 85 and that as against him the sub-tenancy of the defendants is not valid. To give effect to this contention of the respondent, it would be necessary to read into section 85, words which do not find a place there. We should have to read and construe section 85 as if it provided that sub-leases by the occupancy raiyat shall not be valid against his landlord nor as against a person who has purchased at a sale in execution of a decree for arrears of rent held at the instance of the landlord. The obvious answer to the contention of the respondent accordingly is that these or similar words are not in section 85. The substance of the argument is a choice between two conflicting positions. One possible view is that as the sub-tenancy is not valid against the landlord, when he takes proceedings to enforce the decree for arrears of rent and brings the holding to sale, he does so on the assumption that the sub-tenancy does not exist; that is, he acts in a manner contrary to the express language of section 159. The other possible view

is that the landlord acts in conformity with section 159, and that the property is sold with liberty reserved to the purchaser to annul the sub-tenancy. If the landlord himself happens to purchase, it becomes superfluous for him to proceed in the manner provided in section 167 by service of notice upon the encumbrancer, because as soon as he is brought into direct contact with the sub-tenant, he is entitled to take up the position that the sub-tenancy as against him is not valid. On the other hand, if the property passes into the hands of a stranger, he takes the requisite steps under section 167 to annul the sub-tenancy. This view does not involve any hardship upon the purchaser, nor does it tend to depreciate the value of the holding as was apprehended by the respondent. We may add that the question which now requires decision was left open for consideration in the case of *Ashutosh v. Banomati* (1), and after full consideration of the arguments addressed to us we are of opinion that it should be answered against the respondent.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below. The effect of our decision will be that the defendants will be tenants under the plaintiff in respect of the first seven parcels of land.

N. C. S.

Appeal allowed.

(1) (1913) 19 C. W. N. 412, 18 C. I. J. 252

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ORIGINAL CIVIL.*Before Imam J*

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May 24.**SUKUMARI GHOSE***v.***GOPI MOHAN GOSWAMI.***

Costs—Principal and Agent—Costs between Principal and Agent in a suit for account—Manager, liability of, for costs—Presidency Small Cause Courts Act (XV of 1882), s. 22—Practice.

In the matter of costs, the Court's discretion is to be exercised with special reference to all the circumstances of the case including the conduct of parties.

Sheo Dyal Tiwari Choudhury v. Bishunath Tiwari Choudhury (1) referred to.

If a person takes up the management of another's estate and collects and disburses money, he must be ready with his account, and if his failure to perform this obvious duty necessitates a suit, then he must pay the costs.

Collyer v. Dudley (2) referred to.

So, where a manager has deliberately set up a false defence, and on being ordered to render an account, submits a false account and suppresses important documents thereby hampering and prejudicing the inquiry, it is only right that he should pay the full costs of, and incidental to, the suit.

Ramgopal Chatterjee v. Bhoban Mohan Banerjee (3) and *Harrinath Rai v. Krishn Kumar Balkhi* (4) referred to.

Because in a suit for an account a sum of money less than Rupees 1,000 was found due by the defendant, it does not follow that such a suit should have been instituted in the Presidency Small Cause Court, and that the provisions of s. 22 of the Presidency Small Cause Courts Act apply.

* Original Civil Suit No. 176 of 1910 and Small Cause Court Transfer Suit No. 3 of 1910.

(1) (1888) 9 W. R. 61, 63.

(2) (1823) 2 L. J. Ch. 15.

(3) (1864) Coryton's Rep. 126.

(4) (1886) I. L. R. 14 Calc 147, 159.

THIS was a suit for account brought by the plaintiffs against the defendant, who had been manager of certain property situated outside Calcutta belonging to the late Mr. Lal Mohan Ghose. A preliminary decree had been passed for an account to be taken before the Assistant Referee; and the matter came before Imam J. for further directions on the Assistant Referee's report.

Prior to the institution of this suit in the High Court, the defendant had filed a suit against the plaintiffs in the Presidency Small Cause Court for the recovery of arrears of salary. The plaintiffs did not dispute the claim, but had demanded from the defendant an account of his management; and on his denying that he was accountable at all, they filed the present suit in the High Court and obtained an order for the removal of the defendant's suit in the Presidency Small Cause Court for trial with this suit in the High Court.

Mr. H. D. Bose and *Mr. B. K. Ghose*, for the plaintiffs.

Mr. S. R. Das, for the defendant.

IMAM J. This matter comes up for further direction on the Assistant Referee's report. The principal question involved in it is one of costs. The defendant had sued the plaintiffs for arrears of salary amounting to Rs. 1,886-12-6 in the Small Cause Court of Calcutta. The plaintiffs then instituted this suit in this Court for account against the defendant. The suit in the Small Cause Court was removed to this Court for trial with this suit. The plaintiffs represent the estate of the late Mr. Lal Mohan Ghose, and it is the common case of the parties that in 1908 the defendant was the Manager of the Bairagadi estate

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belonging to the deceased. In answer to the claim of the plaintiffs for account, the defendant in his written statements stated that he was not accountable to the plaintiffs nor had he been accountable to the late Mr. Ghose, inasmuch as he had fully explained to the latter all his dealings with the said estate and his management thereof. The plaintiffs admitted the defendant's claim to Rs. 1,886-12-6 as arrears of salary. A preliminary decree was passed for accounts which were directed to be taken before the Assistant Referee. In the state of facts filed by the defendant he showed Rs. 44 or thereabouts as balance due to him. The plaintiffs disputed the accuracy of that account and sought to surcharge and falsify the defendant's state of facts and alleged that he had not accounted for various sums received by him as Manager, and that he had entered certain fictitious payments in his account. After a prolonged enquiry extending over 60 days or more, the Assistant Referee has reported that the defendant has failed to account for Rs. 716 out of the moneys collected by him as Manager of the said Bairagadi estate. From the report of the Assistant Referee, which stands confirmed by effluxion of time, it appears that the book most important for the enquiry, viz., the Talab-baki, was suppressed by the defendant though he had been called upon to produce it.

He has been guilty of suppression of other material documents also. Judging from the Assistant Referee's report the defendant's conduct deserves the fullest condemnation. His motives have been described by the Assistant Referee as "not honest from the outset." The Court's discretion in the matter of costs, as was explained in *Shro Dyal Tewary Choudhury v. Bishunath Tewari Choudhury* (1), is to be exercised with special reference to all the circumstances of

the case including the conduct of parties. A person who takes up the management of another's estate and collects and disburses moneys has to be ready with his account. His failure to perform the obvious duty necessitates a suit, and he must pay the plaintiff's costs: *Collyer v. Dudley* (1). In the present suit it is not merely an unreadiness to account that stands to the discredit of the defendant, but he set up a deliberately false defence that he was not accountable at all, and, when decreed to render an account, submitted a false account and suppressed important documents thereby hampering and prejudicing the enquiry before the Assistant Referee. In view of the *bona fide* and honest character of the plaintiff's suit and the reprehensible conduct of the defendant, I am clearly of opinion that the plaintiffs should be allowed full costs, including costs of, and incidental to, the enquiry. The case of *Ram Gopal Chatterjee v. Bhurban Mohan Banerjee* (2) is in point. There is also a higher authority in *Hurrinath Rai v. Krishna Kumar Bakshu* (3), in which their Lordships of the Privy Council ordered the defendant to pay the costs inasmuch as he had taken the untruthful course of denying his receipts, his fiduciary position, and his accountability *in toto*.

Mr. S. R. Das, on behalf of the defendant, objects to costs being allowed to the plaintiffs on the ground that the suit for account should have been filed in the Small Cause Court. He maintains that the Assistant Referee having found that only a sum of Rs. 716 had remained unaccounted for, the claim was well within the jurisdiction of the Small Cause Court, and the plaintiffs having obtained a decree for less than Rs. 1,000 in this Court, they are not entitled to any

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(1) (1823) 2 L.J.C. 15. (2) (1864) Ceylon 120
(3) (1886) 1 L.R. 14 Cal. 147, 159.

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costs under the provisions of section 22 of the Presidency Small Cause Courts Act. I cannot accede to this contention inasmuch as the plaintiffs could institute their suit in the Small Cause Court only if they were in a position to appraise its value within the pecuniary jurisdiction of that Court, which they could not do on the facts of this case. The sum ascertained by the Assistant Referee has been arrived at by an enquiry. I do not think that a suit for account without a claim to a specific sum within the competence of the Small Cause Court can lie in that Court. But even if it were conceded that this suit was cognizable by the Small Cause Court, I would not hesitate to certify that it was fit to be brought in the High Court.

For these reasons, I allow full costs on Scale No. 2 to the plaintiffs, including reserved costs, if any. The costs will include the enquiry before the Assistant Referee and the Commission at Dacca.

The defendant will get the costs of the Small Cause Court transferred suit on the Small Cause Court scale. To the defendant is decreed the sum of Rs. 1,370-9-7½ from the plaintiffs on account of salary. Out of the said sum the sum of Rs. 1,170-12-6 will carry interest at 6 per cent. from the date of the Assistant Referee's report till the date it came to be filed.

The amount deposited by the plaintiffs in the Small Cause Court transferred suit, or any portion of it, will not be withdrawn by the defendant till the costs of both parties have been ascertained. The plaintiffs will get the costs of this application.

W. M. C.

Attorney for the plaintiff: *S. C. Mukerjee.*
Attorney for the defendant: *H. N. Dutt.*

APPELLATE CIVIL.

Before D. Chatterjee and Chapman J.J.

BHIKARIRAM BHAGAT

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June 7,

MAHARAJ BA HADUR SINGH.*

Occupancy Right—Incidents of another tenancy under the same landlord but in different localities in the occupation of the occupancy raiyat—Bengal Tenancy Act (VIII of 1885), s. 182.

The provisions of the Bengal Tenancy Act are applicable to a tenancy for building a shop in a market in which the tenant afterwards came to reside, where the tenant has occupancy right in certain *jamas* under the same landlord in a different village from before the acquisition of the tenancy for building the shop.

Golam Morla v. Abdool Soorar Mondul (1) *Protop Chandra Das v. Biseswar Pramanick* (2), *Kripa Nath Chakrabutty v. Sheikh Anu* (3) and *Harihar Chatterjee v. Dina Bera* (4) referred to.

SECOND APPEAL by Bhikariram Bhagat and others, the defendants.

The appeal arose out of a suit for ejectment, on the defendants not complying with the notice to quit. In a previous suit by the plaintiff for ejectment against the defendants as trespassers on the lands in suit, it was decided that the defendants held the land in suit as tenants and could not therefore be ejected as trespassers. The case for the plaintiff was that the defendants

*Appeal from Appellate Decree, No. 572 of 1913, against the decree of E. Panton, District Judge of Mursidabad, dated Sep. 25, 1912, modifying the decree of Debendra Kalyan Bose, Subordinate Judge of Mursidabad, dated June 30, 1911.

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had been holding the lands without any permanent right for about ten years and had built a *pakka* house on one of the plots in dispute without any right or permission from the plaintiff.

The defendants denied possession of plots other than the one on which the house stood and contended, *inter alia*, that as they held many *raiyatijamas* under the plaintiff elsewhere, they held in their permanent occupancy right the remaining plot in dispute in the present suit where they had built their *pakka* house more than 12 years before the present suit with the knowledge of the plaintiff, that as such the suit was barred by estoppel and limitation, and that they were not liable to be ejected, and even if they were, they were entitled to compensation for the house. They further pleaded that no notice to quit was ever served on them, that the alleged notice was not legal and sufficient and that the plaintiff was not entitled to any compensation.

The learned Subordinate Judge held that the defendants were not in possession of plots other than the one on which the house stood and partially decreed the suit. He declared the plaintiff's right to eject the defendants on payment by the former of a sum of Rs. 1,200 as compensation for the buildings. Against this the plaintiff appealed, his contention being that the defendants were not entitled to any compensation. The scope of the appeal was widened by the cross-objection of the defendants in which they challenged the finding that they could be ejected at all. The learned District Judge allowed the appeal with costs and modified the decree of the lower Court by declaring that the defendants were entitled to remove the buildings from the land and allowed them six months' time from the decree to do this. This provision was made in lieu of the provision as to compensation in

the decree of the Court of first instance. The cross-objection was dismissed.

The defendants thereupon appealed to the High Court.

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Babu Ramchandra Majumdar (with him *Babu Nagendranath Sen*), for the appellants. Section 182 of the Bengal Tenancy Act applies. An occupancy *raiyat* acquires the same right in other *jamas* that he may have in the locality. It is not even necessary for the acquisition of such right in the new *jama* that the tenant should hold under the same landlord : *Golam Mowla v. Abdool Sowar Mondul* (1), *Protap Chandra Das v. Biseswar Pramanick* (2), *Kripa Nath Chakrabutty v. Sheikh Anu* (3), *Harihar Chatterjee v. Dinu Bera* (4).

On the question of limitation, I contend that the District Judge is wrong in thinking that adverse possession for more than 12 years is needed to create a bar. Just 12 years is enough. We set up a permanent right. See section 45, Bengal Tenancy Act.

Babu Dwarka Nath Chakravarti, for the respondent. My learned friend has misunderstood the cases cited by him. The cases do not support the extreme contention that occupancy right may be acquired in all cases. It would be absurd to hold so. The original purpose of the tenancy must be looked to. Occupancy right can only be acquired in agricultural lands or in homestead. Where the original object was neither of the two, the tenant cannot acquire occupancy right. The landlord has rights as much as anybody else.

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[Judgment was reserved for a fortnight and then another week to allow parties to come to terms. The respondent was unwilling to settle the matter.]

D. CHATTERJEE AND CHAPMAN JJ. The defendants were *raiyyats* holding certain *jamas* under the father of the plaintiff at Nalhati. When the Bokhara station on the Nalhati-Azinganj Railway (broad gauge) was opened, the father of the plaintiff wanted to establish a bazar. To do so he wanted shop-keepers to settle on his lands near the station. The defendant Bhikhari was asked to come and open a shop and he did come and was given some lands to build his shop which would necessarily be his dwelling house also. He built a *katcha* thatched house and held his shop there for a time. Then after a short time he built a *pakka* room and subsequently other *pakka* rooms and resided with his family there and held his shop as well. He acquired several *raiayati jamas* in this place also under the plaintiff, so that he is a *raiyat* under the plaintiff at Nalhati as well as this place called Sanko or Raipur Telkul. Being a *raiyat* at Nalhati he acquired the lands for building the shop where he resided and then he became a *raiyat* at Raipur Telkul or Sanko and resided in the shop-building and carried on his agricultural operations from there.

The plaintiff, at first, sued to evict him as a trespasser but failed, the Court holding that the defendants were tenants and could not be ejected without a proper notice.

This suit was then brought after the service of a notice. The question whether the tenancy is governed by the Transfer of Property Act or by the Bengal Tenancy Act was raised in the previous case, but in view of the finding on the question of notice the

Court did not think it necessary to go into the question. In this case the trial Judge held that, as the land was originally taken for building a shop, it was governed by the Transfer of Property Act and made a decree for ejectment on the payment of Rs. 1,200 as compensation. On appeal by the plaintiff and cross-appeal by the defendants, the learned District Judge decreed the entire suit, allowing the defendants time to remove the materials of their *pakka* house.

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In second appeal, it has been contended that both the Courts below are wrong in not applying the provision of the Bengal Tenancy Act. We think this contention is supported by a number of decisions of this Court dating back from 1893. In the case *Golam Mowla v. Abdool Sowar Mondul* (1), Mr. Justice Rampini held that if a *raiyat* holding *jotes* with occupancy rights in a village holds *bastu* land in the same village, not as a *raiyat* but separately from his *raiayati* holding, he would, in the absence of a local custom to the contrary, have a right of occupancy in the homestead also. It is not clear from the report whether the homestead and the *jote* were held under the same landlord. Then in the case of *Protap Chandra Das v. Biseshwar Pramanick* (2), the homestead was under one landlord and the *jote* under another in the same village. Mr. Justice Geidt held that section 182 of the Bengal Tenancy Act applied. Mr. Justice Ghose did not think it necessary to go into the question. This was in 1901. Then in 1906 came the case of *Kripa Nath Chakrabutty v. Sheikh Anu* (3), in which Rampini and Mookerjee JJ. held that the homestead and the *raiayati* need not be in the same village or under the same landlord and section 182, Bengal Tenancy Act, applied when both were different. The above cases were followed by

(1) (1893) 13 C. L. J. 255. (2) (1901) 9 C. W. N. 416.

(3) (1906) 10 C. W. N. 944.

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Mookerjee and Teunon JJ. in the case of *Harihar Chatterjee v. Dinu Bera* (1), and it was held that for the application of section 182 of the Bengal Tenancy Act it was not necessary that the homestead and the *raiayati* should be either in the same village or under the same landlord. Under these rulings, the defendants would be holding the homestead lands at Sanko subject to the provisions of the Bengal Tenancy Act from the beginning.

But supposing that during the first 2 or 3 years during which the defendants merely held their shop and resided on the disputed land, and held *jotes* at Nalhati, they could not invoke the aid of section 182 of the Bengal Tenancy Act, there can be no manner of objection under a long course of rulings of this Court to their claiming the protection of that section after they became agriculturists at Sanko and carried on agriculture from their residence at Sanko which was also used as a shop. The incidents of their tenure of the homestead are, therefore, governed by the Bengal Tenancy Act as no local custom to the contrary is alleged or proved. The suit for ejectment, therefore, fails. As the parties have not been able to agree as to the rent payable for the homestead, that must form the subject of a separate suit.

The appeal is allowed and the suit of the plaintiff dismissed with costs in all Courts.

S. M.

Appeal allowed.

(1) (1911) 14, C. L. J. 170

ORIGINAL CIVIL.

Before Chaudhuri J.

ADMINISTRATOR-GENERAL OF BENGAL

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June 9.

A. D. CHRISTIANA.*

Will—Succession Act (X of 1905) ss. 311, 312—Demonstrative legacy—Interest, whether payable on a demonstrative legacy—Where no time for payment fixed by will, the time from which interest runs.

Where a testator had bequeathed legacies to several grandchildren named in the will to be paid from the sale proceeds of certain house property after the death of a daughter and the marriage of a granddaughter and it was contested that inasmuch as there is no specific provision in the Succession Act for the payment of interest on demonstrative legacies, no interest was payable —

Held, (a) that interest is payable upon demonstrative legacies, and (b) that where there is no time for payment fixed, although the amount is expressly made payable out of a particular fund, the case is governed by the principle laid down in *Lord v. Lord* (1), and s. 311 of the Succession Act applies. Also held, that the rate of interest is 4 per cent per annum.

Lord v. Lord (1), *Chunnam Rajamannar v. Tadikonda Ramachandra Rao* (2), *Mullins v. Smith* (3), and *In re Walford, Kenyon v. Walford* (4) referred to and followed.

In this case the Administrator-General for Bengal took out an originating summons for the determination of certain questions which had arisen in connection with the administration of the estate of one Alexander Watson Christiana, who died in Calcutta leaving a will dated 1st October 1897. Probate of the will was granted on 10th January 1898 to the executor appointed by the will who administered the

*Original Civil Suit No. 597 of 1915

(1) (1867) 1 R. 2 Ch. App. 782, 789	(3) (1860) 1 Drew & Son 231
(2) (1905) 1 L. R. 29 Mad. 155	(4) [1912] 1 Ch. 219, 225

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estate until 13th January 1911, when he transferred the estate to the Administrator-General of Bengal under the power given to him by the will and the power vested in him by s. 31 of the Administrator-General's Act (I of 1874).

By his will the testator after giving certain annuities and legacies, which are immaterial for the purposes of this report, made the following bequests and dispositions: "To my grandchildren named in the margin I leave Rs. 1,000 each from the sale of house No. 8, Lindsay Street and my half share of house No. 4, Crooked Lane that is after the death of my daughter Mrs. Georgiana Harriet Russell and the marriage of my granddaughter Florence Elder."

With one exception the grandchildren referred to in the bequest were alive and had attained majority; and the time for the payment of the legacies and the distribution of the residue had arrived. The questions that had arisen and which the Court was asked to determine were:

(i) Whether interest is payable out of the estate of the testator on the legacies of Rs. 1,000 to each of the surviving grandchildren named in the margin of the will and the representative of the deceased grandchild, and if so, from what date and at what rate?

(ii) Amongst whom is the residue of the estate divisible?

Mr. M. Zorab, for the Administrator-General of Bengal, with reference to the question as to payment of interest upon a legacy when no time has been fixed, referred to the case of *In re Walford*, *Kenyon v. Walford* (1).

Mr. R. C. Bonnerjee, for Alexander Danvers Christiana and Louisa Amelia Sinclair, submitted that the

will directed that the residue was to be divided equally among the testator's sons and daughter; and that the daughter intended to be benefited was Mrs. Sinclair.

Mr. H. G. Pearson, on behalf of Mrs. Elizabeth Christiana Swaries as administratrix of the property and credits of Georgiana Harriet Russell and on behalf of herself and other the grandchildren legatees and the representative of a deceased grandchild legatee, contended that although the legacies to the grandchildren named in the margin of the will were demonstrative legacies, a demonstrative legacy is from most points of view a general legacy: see Jarman on Wills, 6th edition, p. 1069, and *Mullins v. Smith* (1), therefore either s. 311 or s. 312 of the Succession Act is applicable according to the circumstances of the case. Inasmuch as in this case there was no express direction fixing the date of payment, s. 311 of the Succession Act applied. He also referred to Williams on Executors, 10th ed., p. 913.

CHAUDHURI J. This suit relates to the estate of one Alexander Watson Christiana. He left a will dated the 1st October 1897. On the 10th January, 1898, probate was granted. The Administrator-General is now in possession of the estate. The following questions have arisen, and the plaintiff is desirous to have them determined by this Court. (i) Whether interest is payable out of the estate of the testator, on the legacies of Rs. 1,000, to each of the surviving grandchildren named in the margin of the said will and the representative of a deceased grandchild, and, if so from what date and at what rate? (ii) Amongst whom, in the events which have happened, is the residue of the estate of the testator, after payment of the

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aforesaid legacies of Rs. 1,000 each, and interest thereon, if any, divisible, and in what shares and proportions is it so divisible? The paragraphs in the will relating to the legacies run thus:—"To my grandchildren named in the margin I leave Rs. 1,000 each from the sale of house No. 8, Lindsay Street and my half share in house No. 4, Crooked Lane, that is after the death of my daughter Mrs. Georgiana Harriett Russell, and the marriage of my granddaughter Florence Elder." These legacies are demonstrative legacies, and the question is as to whether any interest is payable upon these legacies. The Succession Act, section 311 provides "where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death." There are certain exceptions to that section to which I need not refer at present. Section 312 deals with the question of interest where time has been fixed for payment of a general legacy. The first point argued in this case is that inasmuch as there is no specific provision for payment of interest for demonstrative legacies, no interest was payable in this case. It has, however, been held in the case of *Chinnam Rajamannar v. Tadikonda Ramachendra Rao* (1), that the law in England relating to interest on a demonstrative legacy is applicable to sections 130 and 131 of the Probate and Administration Act, which correspond to sections 311 and 312 of the Indian Succession Act. The learned Judges held in that case that the absence of a distinct provision in regard to the payment of interest on demonstrative legacies did not imply an intention to disallow interest in such cases. They approved and followed the case of *Mullins v. Smith* (2). I follow the decision of the Madras Court and

(1) (1905) 1 L.R. 29 Mad. 155. (2) (1860) 1 Drew & Sm. 204.

hold that interest is payable on demonstrative legacies. The question is whether section 311 or 312 is applicable to this case, that is to say, whether a time has been fixed for the payment of the legacy, or whether there is no fixed time for such payment. The principle applicable to cases of this kind has been laid down by Lord Cairns L. J. in the case of *Lord v. Lord* (1) in these terms. "The rule of law is clear, and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval." That principle has been upheld and followed in *Re Walford, Kenyon v. Walford* (2). Here there is no express direction fixing the date of payment. It seems to me to be a case covered by the ruling in *Lord v. Lord* (1), that is to say, that there is no time for payment fixed, although the amount is expressly made payable out of a particular fund, which was not to be got in until after a longer interval. The testator said that he was leaving Rs. 1,000 each to the grandchildren, that it was to be paid out of the sale of the premises 8 Lindsay Street and his shop in Crooked Lane, and that such sale was not to take place till after the death of Mrs. Georgiana Harriett Russell and the marriage of his granddaughter Florence Elder. Mrs. Georgiana Harriett Russell died on the 13th February 1915, and Florence Elder was married on the 30th June 1909. Therefore it seems to me to be a case which is governed by the decision I have referred to, and in that view I think

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section 311 of the Succession Act applies. It is necessary to refer to Exception (2) to that section. This is a case where the testator is not the parent, but a mere remote ancestor. I understand that the legatees, Elizabeth Christiana Swaries and Jessie Houston Russell, have attained majority, but it is unnecessary to refer to their case, because no distinction is made in the section in respect of adults and minors. Now about the rate of interest. The Act provides 4 per cent. which will be the rate allowed upon these legacies. The further question is about the division of the residue. The clause in the will dealing with it runs thus:—"The remaining portion as well as the balance of the accumulated interest or any other money that may be due is to be equally divided among my sons and daughter." I have examined the original will, and learned counsel appearing for the parties have also seen it. There is no question that the expression "daughter" there is in the singular, and there is no mistake in the copy annexed to the plaint. The difficulty that has arisen is owing to the fact that the testator had two daughters, and the question is, to which of these daughters does this clause refer; and, if it is uncertain, can it have any effect so far as the daughters are concerned. It is clear to my mind that the daughter referred to in that clause is Louisa Amelia Sinclair. The residue is only to be divided after the payment of the legacies, which can be only ascertained after the death of the daughter. Mrs. Georgiana Harriett Russell, and therefore there is only one daughter left at the time of the division of the residue, and that daughter is Louisa Amelia Sinclair. Therefore the residue is to be divided according to the ordinary rule, there being two sons and one daughter. Costs of this suit of all the parties to

come out of the estate. The costs of the Administrator-General to come out of the estate as between attorney and client to be fixed on scale No. 2.

Attorneys for the Administrator-General: *Morgan & Co.*

Attorneys for A. D. Christiana and Mrs. L. A. Sinclair: *Walkins & Co.*

Attorneys for Mrs Swaries and grandchildren: *Leslie & Hinds.*

W. M. C.

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Before Woodroffe and Newbould JJ.

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June 14.

Execution of Decree—Decree holder—Payment of money by Judgment debtor by way of interest—Notification of the payment to Court—Certification of the payment—Civil Procedure Code (Act V of 1908) O. XXI, r. 2—Limitation Act (XV of 1877) ss. 19–20.

A decree-holder who has received a certain sum of money by way of payment of interest might either apply to certify payment before execution or might do so on his application for execution of the decree.

On the 17th February, 1906, the plaintiff obtained a decree and on the 18th May, 1911, he applied for execution. At the time of the application he notified to the Court that he had received a certain sum on the 19th June, 1908, from the judgment-debtor towards interest and alleged that the execution was not barred by limitation:—

Held, that the notification to the Court of the receipt of the sum paid by the judgment-debtor was all that the decree-holder had to do in order

* Appeal from Appellate Order, No. 11 of 1913, against the order of the District Judge of Rangpur, dated Sep. 23, 1912, reversing the order of Bipin Chandra Chatterji, Munsif of Rangpur, dated Jan. 29, 1912.

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to certify payment, and O. XXI, r. 2 of the Code of Civil Procedure did not stand in the way.

APPEAL by Eusuffzeman Sarkar and others, the judgment-debtors.

On the 17th February, 1906, one Sanchia Lal Nahata obtained a decree and on the 18th May, 1911, he applied for execution against the judgment-debtors. In his application he notified to the Court that on the 19th June, 1908, the sum of Rs. 10 had been paid by the judgment-debtors towards interest on the decree. Against the execution proceedings the judgment-debtors filed their objection, calling upon the decree-holder to show cause why the decree should not be held to have been barred by limitation. The decree-holder contested that the execution application was within the period of limitation in consequence of the payment of the said sum of Rs. 10 and was, therefore, not barred. The Munsif allowed the objection of the judgment-debtors. On appeal, this order was set aside. Thereupon, the judgment-debtors appealed to the High Court.

Babu Purna Chandra Roy, for the appellants. The application for execution was made under the Civil Procedure Code of 1908 and not under the old Code. The decree-holder could not, therefore, invoke the aid of the old Code, but must adopt the procedure laid down in O. XXI, r. 2 (3) of the new Code, notwithstanding that payment of Rs. 10 was made before the new Code came into operation in 1909. Under the new Code this payment was required to be certified or recorded by the Court executing the decree. This was not done and the right, which the decree-holder had to apply for a certificate, was lost. Furthermore, under the provisions of s. 20 of the Limitation Act payment in order to save a bar by limitation must

be made by the judgment-debtor, or some person duly authorised by him in this behalf. The payment of the sum of Rs. 10 was not so made, or so authorised.

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Babu Mohini Mohan Chakravarti (with him *Babu Abinash Chandra Chakravarti*), for the respondent. The petition of execution was within 3 years of the payment of the Rs. 10 and it contained a notification of such payment. The Court was bound to recognise the payment in order to save limitation. Nothing in the new Code took away the decree-holders' right to apply for execution. The ruling in *Fukeer Chand Bose v. Muddun Mohun Ghose*(1), which was a case under the Code of 1859, governed the present case, the wording of s. 206 of that Code being similar in nature and character to O. XXI, r. 2(3). See also the cases of *Bhoobunessree Debia v. Dinonath Sandyal*(2) and *Hurri Pershad Chowdhry v. Nasib Singh*(3). A separate application for certification was not necessary, the petition for execution being quite sufficient. *Gopal Das v. Ganga Ram*(4) was relied on. See also the notes in Woodroffe's Code of Civil Procedure p. 861. All that was required to be done by the decree-holder was to certify. This was done by him in so far as he notified the payment in his petition. As regards the payment being within the provisions of s. 20 of the Limitation Act, the finding of the lower Appellate Court, that the sum of Rs. 10 was paid by the judgment-debtor himself towards interest, precludes the contention of the judgment-debtor and the payment was a good payment under s. 20 of the Limitation Act.

- (1) (1869) 13 W. R. (F. R.) 40; (2) (1869) 11 W. R. 232
 4 B. L. R. 134. (3) (1894) 1 L. R. 21 C. S. 542
 (4) (1888) 8 ALL. W. N. 115

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Babu Purna Chandra Roy, in reply. The decree-holder ought to have first applied for a certificate of the payment and then applied for execution. Not having done so, the payment was not such as would save limitation. The execution proceeding was, therefore, barred.

WOODROFFE AND NEWBOULD JJ. The point in this appeal is very narrow and very technical. It is the case of a decree-holder applying for execution of his decree. At the time of the application for execution, he notified to the Court by his application that he had received a certain sum from the judgment-debtor, and the finding of the Court is that that sum had been paid in fact by the judgment-debtor by way of interest on the judgment debt. The decree-holder relies upon his payment as saving limitation and the judgment-debtor replies that it cannot have that effect, because the payment of Rs. 10 by the judgment-debtor was not certified; and in the next place, it did not operate to extend the limitation under the provisions of sections 19 and 20 of the Limitation Act. The first point practically is this, that the certification which may be given by the decree-holder under Order XXI, rule 2, must be a certification on some days or at some time different from that on which the application for execution was made. It appears to us that the decree-holder may either apply to certify payment before execution or may do so on his application for execution on the decree. In the present case, he did notify to the Court that he had received this sum of Rs. 10; and that is all that he has to do in order to certify payment. It is, however, said that the Court should then have recorded this certification. It does not seem to me necessary under the circumstances, seeing that the application for execution was made and the

Court acted on such application by allowing such execution to issue. Moreover, the section speaks of "certified" or "recorded." We are, therefore, of opinion that Order XXI, rule 2, does not stand in the way.

As regards the other point, it has been found that Rs. 10 was in fact paid by the judgment-debtor himself by way of interest. That finding is sufficient.

The fact of the endorsement and the question as to who made it and the authority by which it is made are immaterial. The appeal fails and is dismissed with costs.

O. M.

Appeal dismissed.

APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

RASHBEHARY LAL MANDAR

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P

June 15.

ANAND RAM.*

Limitation—Court of Wards, competency of to acknowledge debt—Effect of acknowledgement of pre-existing debt by the Court as regards limitation—Court of Wards Act (Beng. IY of 1879), s. 18—Limitation Act (IX of 1908), s. 19.

The Court of Wards Act 1879, does not contain any express power authorizing the Court to execute promissory notes. But there can be no doubt on the authorities that the Court has power to give an acknowledgement so as to give a new period of limitation under s. 19 of the Limitation Act.

Beti Maharan v. Collector of Elasrik (1), Ram Charan Das v. Gaya Prasad (2), and Kondamalala Langha Beti v. Alluri Sareeravudu (3) applied.

* Appeal from Original Decree, No. 450 of 1912, against the decree of Dina Nath Dey, Subordinate Judge of Singapore, dated Sep. 3, 1912.

(1) (1894) I L R. 17 ALL 195.

(2) (1910) I L R. 34 ALL 422.

(3) (1910) I L R. 34 Mad 221.

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APPEAL by Rashbehary Lal Mandar, the defendant, through the manager under the Court of Wards.

The plaintiffs sued the defendant on the basis of a promissory note executed by the Court of Wards on the 31st March, 1909. At the date of the execution of the promissory note, the defendant's estate was under the Court of Wards, who had taken charge in November, 1908, the defendant having been declared a disqualified proprietor under s. 6, cl. (e) of the Court of Wards Act. The estate was released before the hearing of the suit. In November, 1909, the plaintiffs submitted their claims against the defendant's estate to the Court of Wards, and it being found that a sum of about Rs. 3,000 was due on a promissory note previously executed by the defendant and a sum of about Rs. 6,000 on account of dealings in cloth with the plaintiffs' firms, the Manager of the Court of Wards, under directions from the Board of Revenue and the Collector, executed the promissory note in suit for Rs. 9,132-6-9. The plaintiffs sued on the 6th March, 1912, claiming Rs. '1,541-2.

The suit was at first decreed *ex parte* on the 26th March, 1912. The manager of the defendant's estate under the Court of Wards then applied to have the *ex parte* decree set aside and it was set aside and the suit was restored to the file on the 25th June. On successive applications of the manager for time to file his defence, the suit was ultimately adjourned to the 22nd August. In the meantime, on the 15th August, the defendant's estate was released from the Court of Wards, and on the 22nd August the defendant himself filed his defence, wherein he contended that the promissory note was executed without his consent and in spite of his objection, that the plaintiffs got it executed by misrepresenting facts to the Court of Wards and were, therefore, entitled to bind the defendant,

that nothing was due to the plaintiffs on account of the transactions with the Calcutta firm of the plaintiffs, and that as regards the transactions with the Bhagalpur firm, the defendant had executed a promissory note in plaintiffs' favour and made payments on account thereof from time to time, but that he was unable to say then how much was still due to the plaintiffs on that account, as the defendant had not yet got back all his documents from the Court of Wards. Limitation was also pleaded in general terms and any agreement to pay interest was denied.

On the 19th September, the defendant filed an additional written statement in which he contended, *inter alia*, that the manager under the Court of Wards had no authority to execute the handnote and was not legally binding upon the defendant. He also pleaded a payment of Rs. 900 in respect of transactions with the Bhagalpur firm after the execution of the promissory note thereof.

The Court of first instance disbelieved payments and decreed the suit in its entirety. Thereupon, the defendant appealed to the High Court.

Dr. Dwarkanath Mitra (with him *Babu Nareshchandra Singha*), for the appellant. The Court of Wards had no power to execute the handnote, at least in respect of the sum found due on account of the dealings in cloth. The test is benefit to the estate. The execution of the promissory note did not benefit the estate; see sections 18 and 10 D of the Court of Wards Act, 1879, and Board's Rule No. 45 in Bengal Wards Manual at p. 46.

Part of the claim was already barred by limitation when the promissory note was executed. The plaintiffs cannot have a decree for this portion of the claim. The Court of Wards had no power to execute promissory notes for barred debts: *Annapigauda v.*

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Sangadigyapi (1), *Beti Maharani v. Collector of Etawah* (2), *Kondamodalu Linga Reddi v. Alluri Sarvarayudu* (3), *Jadu Lal Sahu v. Janki Koer* (4).

Babu Umakali Mukerji (with him *Babu Gurudas Singha*), for the respondents. The Court of Wards can acknowledge liability. Such acknowledgment will bind the ward. The promissory note can be considered as an acknowledgment. The Court of Wards made an enquiry under s. 10D of the Court of Wards Act and admitted the claim within the period of limitation. Limitation is saved by acknowledgment. *Beti Maharani v. Collector of Etawah* (2), *Kondamodalu Linga Reddi v. Alluri Sarvarayudu* (3) and *Ram Charan Das v. Gaya Prasad* (5).

Dr. Dwarkanath Mitra, in reply.

Cur. adv. vult.

FLETCHER J. This is an appeal by the defendant from the judgment of the learned Subordinate Judge of Bhagalpur dated the 30th of September, 1912. The plaintiffs brought the suit to recover from the defendant the sum of Rs. 11,541-2 for principal and interest due on a promissory note dated the 2nd of December, 1909.

The plaintiffs have two firms, one at Bhagalpur and the other at Calcutta. Admittedly, the defendant had dealings with both these firms.

The transactions with the Bhagalpur firm of the plaintiffs were adjusted and on the 30th of Bhadra, 1314 F. S. corresponding with the 21st of September, 1907, the defendant executed in favour of the plaintiffs a promissory note payable on demand for Rs. 2,542 with interest at 12 annas per cent per mensem.

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| (1) (1901) I. L. R. 26 Bom. 221. | (3) (1910) I. L. R. 34 Mad. 221. |
| (2) (1894) I. L. R. 17 All. 193. | (4) (1909) I. L. R. 35 Calc. 575. |
| (5) (1908) I. L. R. 30 All. 422, 437. | |

The defendant states that after the execution of this promissory note he made a payment of Rs. 900. There seems to be no truth in this statement.

The goods taken from the Calcutta shop of the plaintiffs were as follows:—On the 10th of September, 1906, goods of the value of Rs. 5,213-6-6. On the 12th of September, 1906, goods of the value of Rs. 1,202-9-5. On the 30th of January, 1907, goods of the value of Rs. 1,685-14-6, and on the 3rd of February, 1907, goods of the value of Rs. 1,114-7. The plaintiffs also prove that there was an agreement to pay interest on the balance due to the Calcutta shop at the rate of 12 annas per cent. per mensem. I reject the defendant's story as to his dealings with the Calcutta shop of the plaintiffs and also as to his having paid their account in full. The payments made by the defendant on account of the moneys due to the Calcutta shop are as follows:—On the 14th November, 1906, the sum of Rs. 1,000; on the 26th January, 1907, the sum of Rs. 1,959; on the 2nd of February, 1907, Rs. 600; on the 30th of April, 1907, Rs. 600 and on the 2nd of May, 1907, the sum of Rs. 400. On the 11th November, 1908, the Court of Wards took charge of the plaintiffs' estate. The Court then issued the usual notice calling on persons claiming to be creditors of the disqualified proprietor (the defendant) to prove their debts. The plaintiffs duly appeared and produced their accounts and satisfied the Court as to the amount due to them. Accordingly, under the directions of the Court of Wards, the manager on the 2nd of December, 1909, executed the promissory note that is now sued upon.

The defendant has contended on this appeal that the Court had no power to execute a promissory note in respect of any of his debts and that the promissory note so far as it relates to a portion of the defendant's

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due to the Calcutta shop was in respect of debts that were barred by limitation.

The Court of Wards Act (Beng. IX of 1879) does not contain any express power authorising the Court to execute promissory notes. Section 18 provides that the Court "may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward."

It may be doubted whether the Court had under the terms of section 18 power to direct the execution of a promissory note. But there can be no doubt on the authorities that the Court has power to give an acknowledgment, so as to give a new period of limitation under section 19 of the Indian Limitation Act.

In the case of *Beti Maharani v. Collector of Etawah* (1), the Privy Council observed with reference to such an acknowledgment, "It must be taken that the Court's act would bind the ward."

In the course of his judgment in the case of *Ram Charan Das v. Gaya Prasad* (2), Banerji J. remarked, "This Court has held in *Kamla Kuar v. Har Sahai* (3), that an acknowledgment by the Court of Wards gives a fresh start for the computation of limitation." The same view was adopted by the Madras High Court in the case of *Kondamodalu Linga Reddi v. Alluri Sarvarayudu* (4). The report of the Deputy Collector of the 20th July, 1909 (Ex. 10), the letter from the Board of Revenue of the 21st of August, 1909 (Ex. 20), the letter from the Collector of the 18th of September, 1909 (Ex. 14), and the promissory note sued on (Ex. 6) are all clear acknowledgments of the debts due to the plaintiffs. At the date of those acknowledgments the promissory note of the 21st September, 1907, with respect to dealings with

(1) (1894) I. L. R. 17 All 198.

(3) (1888) All. W. N. 137.

(2) (1908) I. L. R. 30 All 422, 437.

(4) (1910) I. L. R. 34 Mad. 221.

the Bhagalpur firm, was clearly not barred by limitation. The earliest dealing with the Calcutta shop was the 10th September, 1906. The acknowledgment by the Board of Revenue in their letter (Ex. 20) of the 24th of August, 1909, was within 3 years from the date of the debts. This suit was therefore, in my opinion, brought within time. The present appeal, therefore, fails and must be dismissed with costs. Let the record be sent down at once.

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RICHARDSON J. I agree.

S. M.

Appeal dismissed.

APPELLATE CIVIL.

Before Jenkins C.J., and Humeood J.

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July 21.

BRAJA MOHAN BHUKTA.*

Mistake—Suit to set aside previous decree on ground of mistake—Competence of compromise and decree thereon—Rectification—Fraud.

A decree can be set aside by suit on the ground of fraud if of the required character.

But a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree made a mistake.

Jogeswar Atka v. Ganga Bushna Ghattachar (1) dissentient seen.

Mahomed Golab v. Mahomed Suleiman (2), *Sadko Misser v. Golab Singh* (3), and *Bhandi Singh v. Dowlat Ray* (4) referred to.

* Appeal from Appellate Decree, No. 1933 of 1914, against the decree of Benode Behari Mitter, Subordinate Judge of Midnapur, dated April 7, 1914, affirming the decree of Phanindra Mohan Chatterjee, Munsif of Tamluk, dated Feb. 22, 1913.

(1) (1904) 8 C. W. N. 473.

(4) (1912) 17 C. W. N. 82;

(2) (1894) 1 L. R. 21 Calc. 612

15 C. L. J. 675.

(3) (1897) 3 C. W. N. 375.

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due to the Calcutta shop was in respect of debts that were barred by limitation.

The Court of Wards Act (Beng. IX of 1879) does not contain any express power authorising the Court to execute promissory notes. Section 18 provides that the Court "may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward."

It may be doubted whether the Court had under the terms of section 18 power to direct the execution of a promissory note. But there can be no doubt on the authorities that the Court has power to give an acknowledgment, so as to give a new period of limitation under section 19 of the Indian Limitation Act.

In the case of *Beti Mahirani v. Collector of Etawah* (1), the Privy Council observed with reference to such an acknowledgment, "It must be taken that the Court's act would bind the ward."

In the course of his judgment in the case of *Ram Charan Das v. Gaya Prasad* (2), Banerji J. remarked, "This Court has held in *Kamla Kuar v. Har Sahai* (3), that an acknowledgment by the Court of Wards gives a fresh start for the computation of limitation." The same view was adopted by the Madras High Court in the case of *Kondamodalu Linga Reddi v. Alluri Sarvarayudu* (4). The report of the Deputy Collector of the 20th July, 1909 (Ex. 10), the letter from the Board of Revenue of the 24th of August, 1909 (Ex. 20), the letter from the Collector of the 18th of September, 1909 (Ex. 14), and the promissory note sued on (Ex. 6) are all clear acknowledgments of the debts due to the plaintiffs. At the date of those acknowledgments the promissory note of the 21st September, 1907, with respect to dealings with

(1) (1894) I. L. R. 17 All. 198. (3) (1883) All. W. N. 137.

(2) (1908) I. L. R. 30 All. 422, 437. (4) (1910) I. L. R. 34 Mad. 221.

the Bhagalpur firm, was clearly not barred by limitation. The earliest dealing with the Calcutta shop was the 10th September, 1906. The acknowledgment by the Board of Revenue in their letter (Ex. 20) of the 24th of August, 1909, was within 3 years from the date of the debts. This suit was therefore, in my opinion, brought within time. The present appeal, therefore, fails and must be dismissed with costs. Let the record be sent down at once.

RICHARDSON J. I agree.

S. M.

Appeal dismissed.

APPELLATE CIVIL.

Before Jenkins C.J., and Holmeood J.

KUSODHAJ BHUKTA

1915

v.

July 21.

BRAJA MOHAN BHUKTA.*

Mistake—Suit to set aside previous decree on ground of mistake—Competence of compromise and decree thereon—Rectification—Fraud.

A decree can be set aside by suit on the ground of fraud if of the required character.

But a suit does not lie to set aside a decree in a previous suit on the ground that the Judge in passing that decree made a mistake.

Jogeswar Atta v. Ganga Bishnu Ghattacal (1) dissented from.

Mahomed Golab v. Mahomed Suleman (2), *Saddo Messer v. Golab Singh* (3), and *Bhandi Singh v. Doulat Ray* (4) referred to.

* Appeal from Appellate Decree, No. 1933 of 1914, against the decree of Benode Behari Mitter, Subordinate Judge of Malda, dated April 7, 1914, affirming the decree of Phanindra Mohan Chatterjee, Munsif of Tamak, dated Feb. 22, 1913.

(1) (1904) 8 C. W. N. 473.

(4) (1912) 17 C. W. N. 42;

(2) (1894) 1 L. R. 21 Calc. 612.

(5) C. L. J. 675.

(3) (1897) 3 C. W. N. 575.

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While in the case of a compromise, as the contract is capable of being rectified for an appropriate mistake, so, as the necessary consequence, is the decree which is merely a more formal expression given to that contract.

Huddersfield Banking Co. Ltd. v. Henry Lister and Son Ltd. (1) followed.

SECOND Appeal by Kusodhaj Bhukta, the defendant No. 1.

This was a declaratory suit to set aside a previous decree on the ground of mistake, and to get a $\frac{1}{2}$ share of the lands in suit on establishment of plaintiff's title thereto. The defendants Nos. 2 and 3 supported the plaintiff. The defendant No. 1 contended that neither the plaintiff nor the defendants Nos. 2 and 3 ever had any right to the disputed lands, that the previous decree was not liable to be set aside or rectified, and he had the right to $\frac{1}{2}$ of the properties in suit. The learned Munsif, 1st Court of Tamluk, decreed the suit; and on appeal the Subordinate Judge of Midnapore affirmed that decision. Thereupon, the defendant No. 1 preferred this appeal to the High Court.

Babu Bipin Behari Ghose (senior) (with him *Babu Satindra Nath Roy* and *Babu Manmatha Nath Pal*), for the appellant. The main question is whether a civil suit lies to declare that a previous suit between the same parties was erroneous. I say such a suit does not lie.

[JENKINS C.J. Is there no fraud alleged?]

Nothing of the kind. This was pointed out when my Lord the Chief Justice admitted the appeal. The learned Munsif held that such a suit was maintainable following the decision of Maclean C. J. in *Jogeswar Atha v. Ganga Bishnu Ghattach* (2), and that section 623 of the Code of Civil Procedure was an enabling section only and not compulsory. Such a suit will not

lie in England. I rely on the case of *Bhandi Singh v. Dowlat Ray* (1).

[JENKINS C.J. (to Respondent). Are you going to contend that a suit can be brought to correct a previous decree?]

[*Babu Jyotish Chandra Hazra, Jogeswar Atha's Case* (2) is authority that a suit will lie for the correction of previous mistakes.]

That case has been considered in later cases, viz., *Chand Mea v. Srimati Asima Banu* (3), and *Bhandi Singh v. Dowlat Ray* (1) where it has been distinguished. *Kaveri Ammal v. Sastri Ramier* (4), and *Sri Gopal v. Pithri Singh* (5) are also in my favour. In *Jogeswar Atha's Case* (2) there was no consent decree but a mere clerical error in describing property No. 4. as No. 3.

My next point is this:—In the previous suit it was settled that defendant No. 1 (appellant) and plaintiff would each have a half share. Thereafter, on the 20th June, the defendants Nos. 2 and 3 executed a release in favour of the plaintiff when it had been declared that they had no interest; so none can accrue to the plaintiff by that release. My next point is that when we have got possession from Court this suit for a mere declaration won't lie under section 42 of the Specific Relief Act: *Mahomed Golab v. Mahomed Sulliman* (6) *Sadho Misser v. Golab Singh* (7).

[JENKINS C.J. If the decree is not tainted by fraud no suit lies to set it aside. We had better hear the other side.]

Babu Jyotish Chandra Hazra, for the respondent. Seeing plaintiff in previous suit claimed a $\frac{1}{2}$ share

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| (1) (1912) 17 C. W. N. 82; | (4) (1902) I. L. R. 26 Mad. 104, 109. |
| 15 C. L. J. 675. | (5) (1902) 6 C. W. N. 889. |
| (2) (1904) 8 C. W. N. 473. | (6) (1894) I. L. R. 21 Calc. 612 |
| (3) (1906) 10 C. W. N. 1024. | (7) (1897) 3 C. W. N. 375. |

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had the Court any jurisdiction to give him a decree for $\frac{1}{2}$? The judgment gave $\frac{1}{3}$ only, and in consequence there was an application for amendment of decree. My submission, therefore, is that the Court had no jurisdiction to pass the decree it did in the first suit.

[JENKINS C.J. The Judicial Committee of the Privy Council has set that question at rest by ruling that every Court has jurisdiction to make a mistake.]

[HOLMWOOD J. Nor has any other Court jurisdiction to set it aside.]

If a Court having jurisdiction exceeds its jurisdiction in the decree, that portion can be set aside.

[JENKINS C.J. It is not a question of jurisdiction, but the error lies in the giving more than was asked for.] Yes.

[*Babu Bipin Behari Ghose*. It could have been corrected in appeal.]

Anything in excess of $\frac{1}{3}$ share was not in suit.

[JENKINS C.J. How could evidence of this be given in the face of section 44 of the Evidence Act?] *Jogeswar Atha's Case* (1) was a Letters Patent Appeal. The decree is not in accordance with the judgment, and I don't see why a separate suit should not lie now.

[JENKINS C.J. There is no cause of action.]

How?

[JENKINS C.J. When it is fraud it is not of the Court, but of the party; while mistake is of the Court. Then what cause of action does the latter give?] Of course nobody has any remedy against mistakes of Court.

[JENKINS C.J. Can you rectify a decree or an agreement when the mistake is unilateral? You can *set aside*, but not *rectify* a decree in case of fraud.]

Yes.

[JENKINS C.J. Rectification of decree must be done by the Court by which it was passed.]

Babu Bipin Behari Ghose. The former decree is correct. Except *Joyeswar Atha* (1) there is no other case in my favour.

[JENKINS C.J.. The power of rectification is given by the Specific Relief Act, and applies to a contract when it does not give correct expression to the contract as made: *Madhavji Bhanji v. Rammath Dadoba* (2). Rectification does not mean correcting a contract.]

Can I not say that my suit is really one for a declaration that the decree does not give what the judgment says?

[HOLMWOOD J. Have you ever heard of a suit to amend a decree?]

The right of suit cannot be limited by Court unless expressly taken away by statute. Here I have a real grievance. Besides cannot my suit be regarded as an application for amendment?

[JENKINS C.J. The Chancery decision on which Sir Francis Maclean professed to act, is a case of consent decree. As you can rectify an agreement, you can also rectify the consent decree based upon an agreement.]

Unless there is a particular remedy appointed for my grievance my right of suit is not taken away. Appeal, Review and Amendment of decree, as provided by the Code of Civil Procedure, do not exhaust all remedies.

[JENKINS C.J. Read the observation of Lindly L.J. in *Huddersfield Banking Co. Ltd. v. Henry Lister & Son, Ltd.* (3). Of course if the agreement cannot be invalidated the consent order is good. To set aside a judgment you must prove fraud. The case of a consent

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(1) (1904) 8 C.W.N. 473.

(2) (1906) I.L.R. 30 Bom. 457.

(3) [1895] 2 Ch. 273.

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decree is not an exception, but a different principle is brought into play.]

In the case of *Percival v. Collector of Chittagong* (1), Ameer Ali and Brett JJ. held that a mistake in decree giving more than was asked in plaint gives rise to a separate suit. .

[JENKINS C.J. You have not been able to bring to our notice any case of a decree after contest being set aside in a subsequent suit, except that of *Jogeswar Atha* (2) which followed an authority regarding consent decrees.]

I have just found the only case where *Jogeswar Atha* (2) has been followed, in the Punjab Records.

[HOLMWOOD J. Well, make a second application for amendment, but don't attempt to bring in a new kind of suit.]

JENKINS C.J. This appeal arises out of a suit to set aside a decree in a previous suit on the ground that the Judge in passing the decree in that previous suit made a mistake. As an authority for this suit and its competence, we have been referred to the decision in the case of *Jogeswar Atha v. Ganga Bishnu Ghattach* (2). It may be that a superficial examination of that decision gives an appearance of authority for the proposition which the respondent advances before us, and apparently has advanced with success in both the lower Courts.

Already it has become noticeable that there has been a crop of cases in this Presidency in which it has been sought to set aside previous decrees on the ground of fraud. The readiness to find fraud encourages this class of litigation and the new departure has been a misfortune. If we encourage the idea that the alleged mistake of a Judge is to furnish a disappointed litigant

with a fresh starting point for keeping his opponent in Court then this misfortune would be gravely increased to the public detriment. There must be some end to litigation. I have said there may appear to be some authority for this suit in the case I have mentioned. But it is apparent from the judgment in that case that there was no intention of proceedings beyond the English authority. No instance has been brought to our notice where a suit to set aside or rectify a decree in a previous suit has succeeded on the ground that the Judge was mistaken though his decree accurately expressed his intention. The only case to which reference was made in the case of *Jogeswar Atha* (1) was a decision of the English Court where the decree was one passed not after contest but on agreement between the parties. But that class of case is governed by a principle that has no application here. It is well settled that a contract of the parties is none the less a contract because there is superadded to it the command of a Judge. It still is a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake, so as the necessary consequence, is the decree which is merely a more formal expression given to that contract. I am unable to draw from those decisions, of which *Huddersfield Banking Co., Ltd., v. Henry Lister & Son, Ltd.* (2) is typical, the conclusion that a decree after contest and giving accurate expression to the Court's intention can be set aside. There is no analogy between the two cases. In the one the decree is set aside merely because the agreement on which it was founded was set aside. In the other case this consideration has no application. It is not as if the litigant is without remedy. Our Code provides ample means without a fresh suit whereby the litigant can obtain the correction

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of error. If a fresh suit can be started on the ground placed before us here, then I can see no end to litigation.

In holding as I do that this suit does not lie, I am making no new departure. I am merely following previous decisions of this Court, and in particular the decision of Sir Comer Petheram in *Mahomed Golab v. Mahomed Sulliman* (1), the decision of a Division Bench in the case of *Sadho Misser v. Golab Singh* (2), and finally the decision of a third Division Bench in the case of *Bhandi Singh v. Dowlat Ray* (3).

It is not suggested in this case that there was any fraud. Had that been so, then the matter would have been different, for it is recognised that a decree can be set aside on the ground of fraud if of the required character.

In my opinion the decree under appeal is erroneous and should be set aside and the suit dismissed with costs throughout.

HOLMWOOD J. I entirely agree with what has fallen from the learned Chief Justice. I desire to add that I do not think it matters whether the decree accurately expresses the intention of the judgment. If there is any divergence between the decree and the judgment, as has been thrown out at one part of the argument before us, then this is a matter for amendment. As long as the Court has jurisdiction and authority to decide a matter, as it has decided it, it cannot be re-opened by a suit.

I desire to emphasise all that has fallen from the Chief Justice with regard to the disastrous consequences which will follow by opening any fresh door of litigation such as appears to be indicated in this case.

G. S.

Appeal allowed.

- (1) (1894) 1 L. R. 21 Calc. 612. (2) (1897) 3 C. W. N. 376.
(3) (1912) 17 C. W. N. 82; 15 C. L. J. 675.

APPELLATE CIVIL.

Before Jenkins C.J., and Holmeood J.

HANSMAN JHA

1915

v.

Aug. 2.

BAHUJI JHA.*

Valuation of Suit—Investigation as to amount or value of subject matter of suit—Competence of Court of first instance to remit investigation of dispute to some other officer—Civil Procedure Code (Act V of 1908), O. XLV, r. 5—Practice.

Rule 5, Order XLV of the Code of Civil Procedure does not empower the Court of first instance, to remit the investigation as to amount or value of subject matter of suit to some other officer ; it must be carried out by that Court.

APPLICATION for leave to appeal to Privy Council by Hansman Jha and another, the defendants.

This was an appeal against the decision of Chitty and Teunon J.J. in A. O. D. No. 42 of 1911, dated 22nd July 1913, affirming the decision after remand of the Additional Subordinate Judge of Darbhanga, dated 22nd December 1910. The value of the land in dispute was stated in the plaint to be Rs. 5,125, a sum of Rs. 560 being claimed as mesne profits up to the date of institution of the suit, no tentative value being given for future mesne profits. But shortly after the filing of the above appeal in the High Court the plaintiff put in a claim for mesne profits and costs aggregating about Rs. 14,000, the mesne profits being over Rs. 10,000. The defendant, appellant to England, thereupon contended that the subject matter of the suit

* Application for leave to appeal to His Majesty in Council, No. 6 of 1914.

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in the Court of first instance as well as in the Court of Appeal was more than Rs. 10,000 regarding the amount of mesne profits to be taken into account. The dispute having been sent down to the Court for investigation was remitted to another officer. On receipt of this report, certain objections were taken in the High Court.

Dr. Dwarka Nath Mitra and Babu Rishindra Nath Sarcar, for the petitioner.

Mr. B. Chakravarti and Babu Chandra Shekhar Bannerji, for the opposite party.

JENKINS C.J AND HOLMWOOD J. In this case a reference has been made to the Court of first instance under rule 5, Order XLV of the Code of Civil Procedure for the purpose of settling a dispute as to the amount or value of the subject matter of the suit in the Court of first instance. The Subordinate Judge has sent back his report but he has not proceeded as the rule requires. The rule does not empower the Court of first instance to remit the investigation to some other officer, it must be carried out by that Court.

The result in this case has been very unsatisfactory because the Subordinate Judge purports to have acted on an admission, the precise character of which we do not know except that it seems to be an admission made for the purpose of meeting the difficulty as to the value of the appeal and no more.

The case must go back to the Subordinate Judge in order that he may himself make the enquiry as is required by rule 5, Order XLV and submit his report on the evidence produced before him.

G. S.

Case remanded,

APPELLATE CIVIL.

Before Jenkins, C. J., and Holmewood J.

LALU DOME

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BEJOY CHAND MAHATAP.*

Simanadars—Chaukidari Chakran Land Act (Beng VI of 1870) s. 1, whether applicable—Bengal District Gazetteer, reference to by High Court

The High Court is entitled to use the Bengal District Gazetteer as a book of reference.

The Chaukidari Chakran Land Act applies to *simanadars*, as the Gazetteer for Bankura shows that in thana Indas (where the lands in suit are situate) the *simanadars* perform those duties which are described in section 1 of the Act.

SECOND APPEAL by Lalu Dome and another, the plaintiffs.

The facts of this case are briefly as follow:—One Jadu Dome held certain lands in thana Indas in the Bankura District either as *simanadar* or *chaukidar*. These lands were resumed as *chaukidari chakran* lands and settled with Maharajadhiraj Bejoy Chand Mahatap Bahadur, the defendant No. 1. The sons of Jadu Dome then filed the present suit claiming, *first*, that as the lands were held as *simanadari* land the resumption proceedings were all bad in law and not binding on them; and, *secondly*, that in any case they were the persons with whom the lands on resumption should have been settled. The Munsif of Kotalpur

* Appeal from Appellate Decree, No. 3141 of 1912, against the decree of L. Palit, District Judge of Bankura, dated Aug. 2 1912 reversing the decree of Sita Nath Ghosh, Munsif of Kotalpur, dated June 23, 1911.

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decreed the suit on 23rd June 1911, but the District Judge of Bankura on 2nd August 1912 allowed the appeal preferred by Moti Lal Raha, the defendant No. 2, observing, "Now the question as to whether the lands were *simanadari* or *chaukidari* does not appear to be of any importance. If they were *chaukidari chakran* land then admittedly they were resumed according to law. If, on the other hand, they were *simanadari* lands, then, as there is no special form prescribed by law for the resumption of *simanadari* lands and for dispensing with the services of the *simanadar*, the fact remains that Jadu Dome's services as *simanadar* were dispensed with and the lands were resumed, it making no difference that in so dispensing with his services and in resuming the lands he was called a *chaukidar*. If such dispensing with his services and such resumption of the lands were wrongful or illegal, then Jadu Dome himself might have had a cause of action for wrongful dismissal and his sons would acquire no right of action thereby." The plaintiffs thereupon preferred this appeal to the High Court.

Babu Baidyanath Dutt and Babu Bhupendra K. Ghose, for the appellants.

Babu Basanta Kumar Bose, Babu Shorashi Charan Mitra, Babu Bipin Behari Ghose and Babu Satyendra Nath Roy, for the respondents.

JENKINS C.J. AND HOLMWOOD J. Two points arise in this appeal. One is as to the location and identity of the parcels. On that there has been a finding of fact by the lower Appellate Court on an issue sent down which is conclusive against the present appellants and there is no ground on which we can interfere.

It is contended, however, that the land in suit is *simanadari* land and not *chaukidari chakran* land, and therefore it is said, Beng. Act VI of 1870 does not apply. The learned vakils who appear before us are agreed on this that if the Act does not apply then the appellants are entitled to succeed, and if the Act applies then the appellants must fail. Now, the words "*chaukidari chakran lands*" by the express provisions of the Act mean lands "which may have been assigned, otherwise than under a temporary settlement, for the maintenance of the officer who may have been bound to keep watch in any village and report crime to the police and in respect to which such officer may be at the time of the passing of this Act liable to render service to a zemindar." Whether this land was *simanadari* or *chaukidari chakran* was left undecided by the lower Appellate Court. This, we think, is to be regretted. But we have the authority of the Bengal District Gazetteer for Bankura that "in thanas Indas and Kotalpur, there are a body of men called *simanadars*, who perform the duties of *chaukidars*. They have grants of lands in lieu of wages; but in some instances these service lands have been resumed under Act VI of 1870." We are entitled to use this book of reference for the purpose of seeing what the duties of *simanadars* are. That is to say, whether their duties correspond with those of which description is given in section 1 of the Chaukidari Chakran Land Act. What is stated in the Gazetteer shows that in thana Indas which is the thana with which we are concerned in this case the *simanadars* perform those duties which are described in section 1 of the Act. If they perform those duties it does not matter in the slightest what they may be called. The definition requires that the duties should be of a particular character. That being so, we must hold that Act VI of 1870

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decreed the suit on 23rd June 1911, but the District Judge of Bankura on 2nd August 1912 allowed the appeal preferred by Moti Lal Raha, the defendant No. 2, observing, "Now the question as to whether the lands were *simanadari* or *chaukidari* does not appear to be of any importance. If they were *chaukidari chakran* land then admittedly they were resumed according to law. If, on the other hand, they were *simanadari* lands, then, as there is no special form prescribed by law for the resumption of *simanadari* lands and for dispensing with the services of the *simanadar*, the fact remains that Jadu Dome's services as *simanadar* were dispensed with and the lands were resumed, it making no difference that in so dispensing with his services and in resuming the lands he was called a *chaukidar*. If such dispensing with his services and such resumption of the lands were wrongful or illegal, then Jadu Dome himself might have had a cause of action for wrongful dismissal and his sons would acquire no right of action thereby." The plaintiffs thereupon preferred this appeal to the High Court.

Babu Baidyanath Dutt and Babu Bhupendra K. Ghose, for the appellants.

Babu Basanta Kumar Bose, Babu Shorashi Charan Mitra, Babu Bipin Behari Ghose and Babu Satyendra Nath Roy, for the respondents.

JENKINS C.J. AND HOLMWOOD J. Two points arise in this appeal. One is as to the location and identity of the parcels. On that there has been a finding of fact by the lower Appellate Court on an issue sent down which is conclusive against the present appellants and there is no ground on which we can interfere.

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It is contended, however, that the land in suit is *simanadari* land and not *chaukidari chakran* land, and therefore it is said, Beng. Act VI of 1870 does not apply. The learned vakils who appear before us are agreed on this that if the Act does not apply then the appellants are entitled to succeed, and if the Act applies then the appellants must fail. Now, the words "*chaukidari chakran* lands" by the express provisions of the Act mean lands "which may have been assigned, otherwise than under a temporary settlement, for the maintenance of the officer who may have been bound to keep watch in any village and report crime to the police and in respect to which such officer may be at the time of the passing of this Act liable to render service to a zemindar." Whether this land was *simanadari* or *chaukidari chakran* was left undecided by the lower Appellate Court. This, we think, is to be regretted. But we have the authority of the Bengal District Gazetteer for Bankura that "in thanas Indas and Kotalpur, there are a body of men called *simanadars*, who perform the duties of *chaukidars*. They have grants of lands in lieu of wages; but in some instances these service lands have been resumed under Act VI of 1870." We are entitled to use this book of reference for the purpose of seeing what the duties of *simanadars* are. That is to say, whether their duties correspond with those of which description is given in section 1 of the Chaukidari Chakran Land Act. What is stated in the Gazetteer shows that in thana Indas which is the thana with which we are concerned in this case the *simanadars* perform those duties which are described in section 1 of the Act. If they perform those duties it does not matter in the slightest what they may be called. The definition requires that the duties should be of a particular character. That being so, we must hold that Act VI of 1870

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applies. It perhaps may seem a hard case on the appellants before us, but there is no escape from it. Certainly there is no escape from it in the suggestion of occupancy right. It is made for the first time in this Court.

We must, therefore, dismiss the appeal with costs.

G. S.

Appeal dismissed.

APPELLATE CIVIL.

Before Mookerjee and Newbould JJ

1915

NIKUNJA RANI CHOWDHURANI

Aug. 11.

v.

SECRETARY OF STATE FOR INDIA.*

Penalty—Court Fees Act (VII of 1870) s. 19 E—Scope of the section—Suit to recover penalty by Secretary of State, maintainability of—Decision of Revenue authority—Jurisdiction of Civil Court.

Unless there is a statutory bar, a suit is maintainable by the Secretary of State for India in Council for recovery of a penalty lawfully imposed.

A Civil Court has no jurisdiction to review the decision of a Revenue authority on the ground that the valuation had been incorrectly made or that the discretion in the imposition of the penalty had been erroneously exercised. But the position is different when the order for imposition of penalty is assailed on the ground that it has not been made in accordance with the statute. If the action of the Revenue authority is *ultra vires* if he has not followed the procedure prescribed by the statute which is the source of his authority, there is no enforceable claim which a Civil Court is bound to recognize.

Maneji v. Secretary of State for India (1) followed.

* Appeal from Appellate Decree, No. 637 of 1912, against the decree of A. R. Edwards, Additional District Judge of Faridpur, dated Feb. 8, 1912, affirming the decree of Behari Lal Chatterjee, offg. Subordinate Judge of Faridpur, dated Aug. 9, 1910.

Section 19 E of the Court Fees Act, 1870, contemplates an application on the part of the person who has taken out probate and produces the same to be duly stamped. It further contemplates that the estimated value of the estate is less than what the value has afterwards proved to be.

A.-G. v. Free (1), Bradlangh v. Clarke (2), Caithorne v. Campbell (3), In the goods of Omdas Bibee (4), In the goods of Stevenson (5) referred to.

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SECOND APPEAL by Nikunja Rani Chowdhurani (executrix to the estate of Kailash Chandra Chowdhury), the defendant.

The facts are shortly these. The defendant applied for probate of will of her deceased husband, Kailash Chandra Chowdhury, to the District Delegate of Faridpur and assessed the value of the estate left by her husband at Rs. 78,112-14-1 pie. Usual notice was issued to the Collector of Faridpur by the Court under section 19 (h) of the Court Fees Act. On the receipt of the notice by the Collector, an enquiry was made as to the value of the properties and the valuation was ascertained to be Rs. 1,69,125-15 annas. On the 10th of December 1908, the defendant was asked by the Collector to amend the valuation and to show cause why undervaluation was made. The Collector further informed the District Delegate as to the amendment of the valuation, but was informed that the probate had already been issued to the defendant on the valuation made by her for which court-fees amounting to Rs. 1,563 had been realized from her on the 28th of August 1908. On the 2nd of January 1909, the defendant appeared before the Collector with a petition praying for amendment of the valuation and depositing the deficit court-fees to the value of Rs. 1,821. The petition was supported by an affidavit. The Collector submitted through the Commissioner all the papers to

(1) (1822) 11 Price 1^c 3.

(3) (1720) 1 Aus-t 214

(2) (18-3) L. R. 8 A. C. 354

(4) (1899) 1 L. R. 26 Cal. 497.

(5) (1902) 6 C. W. N. 893

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the Board of Revenue for orders under section 19 E of the Court Fees Act. The Board of Revenue directed by its order, dated the 4th of July 1909, levy of full court-fees and further penalty of double such court-fees which amounted to Rs. 6,768. This suit was for recovery of that sum of Rs. 6,768 by the Secretary of State through the Collector of Faridpur. The plaint was filed on the 11th of December 1909. Previous to the institution of the suit, the defendant moved the Board of Revenue which reduced the penalty to half, i.e., Rs. 3,384. The plaintiff, thereupon, amended the plaint for recovery of Rs. 3,384.

The Subordinate Judge of Faridpur decreed the suit with costs. The defendant then appealed to the District Judge of Faridpur who dismissed the appeal with costs. Hence this second appeal.

Sir Rashbehari Ghose (with him *Babu Dwarka Nath Chuckerbury* and *Babu Chandra Kanta Ghose*), for the appellant, attacked the judgment on three grounds: (i) that the suit was not maintainable; (ii) that the fine imposed was imposed in contravention of the statute under which the Board acted; (iii) that the penalty was personal and was not recoverable from the estate.

The suit should be dismissed on the ground that the estate of the Testator is not liable for the fine. The fine has been imposed under section 19 E of the Court-Fees Act, and the Court has to determine whether the Board did or did not act in conformity with the law, 19 A and 19 E refer to two different stages. The stage contemplated by 19 E of the Court-Fees Act was never reached and hence there could be no fine. There is no precedent for such a suit. Such suits in England are by way of information by the Attorney-General. The requirements of the section were not complied with.

The fine is imposed upon the executrix. It has been imposed because she has not disclosed the true value of the estate which came into her hand. It is a fine. It is a penalty. There is no law under which you can punish a third person as an offender. Besides the beneficiaries might be infants, as they are in this case. The valuation was amended in this case. There the proceedings ended or should have ended. As soon as my client accepted the valuation of the Collector there was an end to the proceedings.

The Senior Government Pleader (Babu Ram Charan Mitra), for the respondent. The initial mistake was to issue probate without receiving the Collector's report. I see there is a minor concerned in this case. I cannot support this case on the merits.

MOOKERJEE AND NEWBOULD JJ. This is an appeal by the defendant in a suit for recovery of penalty imposed on her under section 19 E of the Court Fees Act, 1870. The facts material for the determination of the questions of law raised before us, are undisputed, and lie in a narrow compass. The appellant applied for probate of a will executed by her husband, Kailash Chandra Choudhury. Thereupon notice was issued to the Collector of Faridpur under sub-section (1) of section 19 H of the Court Fees Act. As no reply was received from the Collector, probate was issued to the petitioner on the 28th August 1908, on payment of Rs. 1,563, the duty payable upon her valuation of the estate. On the 10th December 1908, the Collector of Faridpur, who had meanwhile communicated with the Collector of Backergunge where some of the properties were situated, held that the value of the estate was Rs. 1,69,123 and not Rs. 78,122 as stated by the petitioner in her application for probate. He accordingly directed the petitioner to amend the valuation and to

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explain the cause of under-valuation. Notice was served upon her on the 15th December 1908. On the 2nd January 1909, she presented a petition to the Collector in which she stated that the valuation as made by her agents and accepted by her in good faith, was correct, as the majority of the properties were small shares in various estates and could not fetch large values. She added, however, that she had no desire to litigate the matter and deposited Rs. 1,821, the additional fee payable on the hypothesis that the valuation of the Collector was correct. On the 16th January 1909, the Collector recommended to the Commissioner that the additional sum might be accepted, and the probate amended. This was endorsed by the Commissioner and submitted by him to the Board of Revenue for sanction. The Board, however, on the 4th July, 1909, directed that double the fee payable, that is, Rs. 6,768 be levied as penalty from the petitioner under section 19 E of the Court Fees Act. This order, made without any notice to the petitioner, was communicated to her on the 15th August 1909. On the 11th September 1909, she petitioned to the Board to reconsider the matter, but during the pendency of her application for review, the Collector instituted the present suit on the 11th December 1909 for recovery of Rs. 6,768. On the 16th January 1910, the Board, on review, reduced the penalty to Rs. 3,384. On the 8th August 1910, the plaint was amended and the claim was reduced to that sum. The defendant resisted the claim substantially on three grounds, namely, *firstly*, that the suit as framed was not maintainable; *secondly*, that the penalty had not been imposed in accordance with statutory provisions, and consequently could not be recovered; and, *thirdly*, that even if the penalty was recoverable, no decree could be made against the estate in her hands. The Subordinate

Judge overruled these contentions and decreed the suit. Upon appeal, that decree has been affirmed by the District Judge. The present appeal was summarily dismissed under rule 11 of Order XLI of the Code by Brett and Sharfuddin JJ. The appellant then applied for review of judgment and obtained a Rule. After the retirement of Brett J., the Rule was made absolute by Sharfuddin J., on the ground that important questions of law were involved in the appeal. The appeal has now come up before us for final disposal, and on behalf of the appellant the three grounds urged in the primary Court in answer to the claim have been reiterated.

As regards the first objection, namely, that the suit is not maintainable, we are of opinion that there is no foundation for it. Assume that the penalty has been rightly imposed; there must be some method for its recovery. A suit for its recovery is not barred either explicitly or impliedly. There is no provision in the law for recovery of the penalty by summary process, as section 19 E is not mentioned in sub-section (1) of section 19 J. But even if a summary remedy had been provided, it would not follow that the Crown was not entitled to the ordinary remedy by a suit, which is open to all its subjects. In England, where the Crown claims sums due to it by way of penalty or otherwise, the recovery may be had by information: *A.-G. v. Freer* (1), *Bradlaugh v. Clarke* (2), *Cawthorne v. Campbell* (3). We feel no doubt that unless there is a statutory bar, a suit is maintainable by the Secretary of State for India in Council, for recovery of a penalty lawfully imposed.

As regards the second objection, namely, that the penalty has been imposed in contravention of the

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(1) (1822) 11 Price 183.

(2) (1823) L. R. 8 A. C. 354.

(3) (1790) 1 Aust. 205, 214

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statute and is consequently not recoverable, the question has been raised, whether it is open to the Civil Court to determine the matter. The decision in *Manekji v. Secretary of State for India* (1) shows that a Civil Court has no jurisdiction to review the decision of a Revenue authority on the ground that the valuation had been incorrectly made, or that the discretion in the imposition of the penalty had been erroneously exercised. But the position is different when the order for imposition of penalty is assailed on the ground that it has not been made in accordance with the statute. If the action of the Revenue authority is *ultra vires*, if he has not followed the procedure prescribed by the statute which is the source of his authority, there is no enforceable claim which a Civil Court is bound to recognize. We must consequently determine whether the imposition of the penalty in the case before us was *ultra vires*.

Section 19 (1) of the Court Fees Act contemplates the pre-payment of duty before an order for grant of probate is made: *In the Goods of Omda Bibee* (2). In the case before us, this appears to have been done. A notice was thereupon issued to the Collector under section 19 H to enable him to test the valuation. As no communication was received from him, the Court issued the probate. Subsequently, the Collector called upon the petitioner to amend the valuation under sub-section (3) of section 19 H. The applicant for probate did not accept the valuation made by the Collector. She maintained, on the other hand, that the original valuation made by her was not inadequate, but with a view to avoid expense and litigation, she deposited the excess sum demanded. The Board of Revenue, thereupon, proceeded to impose a penalty on the applicant under section 19 E. In our opinion,

(1) (1896) Bom. P. J. 529

(2) (1899) I. L. R. 26 Calc. 407.

section 19 E had no application in the events which had happened. As pointed out in the case of *Manekji v. Secretary of State* (1), section 19 E contemplates an application on the part of the person who had taken out probate and produces the same to be duly stamped. There was no such application in the present case. The section further contemplates that the estimated value of the estate is less than what the value has afterwards proved to be. In the present case, there was no determination of the valuation by the Probate Court; there was, on the one hand, an estimate by the petitioner, there was, on the other hand, an assessment by the Collector which was not accepted as correct by the applicant; indeed, she disputed the correctness of the grounds for the higher assessment. There was, consequently, no room for the application of section 19 E. If it was intended to take proceedings under section 19 E, as the petitioner disputed the correctness of the assessment by the Collector, the Court should have been moved for an enquiry into the true value of the assets under section 19 H; and if the Collector had adopted such a course, it would have been incumbent upon him, as explained in the case of *In the goods of Stevenson* (2), to make out a case for enquiry upon definite facts. No such step was, however, taken, possibly for the reason that the Collector was of opinion that no penalty should be imposed. But whatever the reason might be, it is plain that there was no compliance with the statutory requirements, and that the contingency contemplated in section 19 E had not arisen. Nor was action taken under section 19 G which is modelled on section 43 of 55 Geo. III, Ch. 184, and section 122 of 56 Geo. III Ch. 56. We may here point out the reason why section 19 J, which prescribes the mode of recovery

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of penalties, makes no mention of section 19 E. In a case where that section is properly applicable, the petitioner is entirely in the hands of the chief controlling Revenue authority, who is at liberty to refuse to stamp the probate till the penalty has been paid; no occasion can consequently arise for recovery, by summary process or by suit, of the penalty imposed under section 19 E. We are of opinion that the action of the Board of Revenue was entirely misconceived, and that the imposition of the penalty under section 19 E was *ultra vires*. There is thus no legal foundation for the claim.

As regards the third objection, namely, that the penalty is personal and is not recoverable from the estate, we need only say that it raises a question of first impression and of some nicety, which need not be determined in view of our decision on the second objection.

The result is that this appeal is allowed, the decree of the District Judge reversed and the suit dismissed with costs in all the Courts.

S. K. B.

Appeal allowed.

CIVIL RULE.

Before Holmeood and Mullick JJ.

NARESH CHANDRA BOSE

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Nov 25.

HIRA LAL BOSE.*

Records, power to call for—Special Tribunal—Calcutta Improvement Act (Beng V of 1911) s. 71, cl. (c)—Land Acquisition Act (I of 1894) s. 53—Practice.

The power to call for records is a power which is undoubtedly inherent in the Judge of a Land Acquisition Court and consequently in the Special Tribunal constituted under the Calcutta Improvement Act

Golap Coomary Dossree v. Raji Sunlar Narayan Deo (1) followed

RULE obtained by Naresh Chandra Bose, claimant No. 2, petitioner.

The opposite party, Hira Lal Bose, had mortgaged some properties including two cottas and odd of land being premises No. 177, Russa Road South, Bhawani-pur, to Naresh Chandra Bose, claimant No. 2, petitioner. On 21st August 1912, he obtained a mortgage decree and in execution thereof purchased the mortgaged property on 15th July 1913 and duly obtained possession through Court. Meanwhile the judgment-debtor having become insolvent his estate passed into the hands of a Receiver. The Calcutta Improvement Trust acquired the said premises, and the Land Acquisition Collector awarded Rs. 11,250 for it. In this proceeding the Receiver filed a petition claiming a

* Civil Rule No. 627 of 1915, against the Order of A. H. Comsing, District Judge of 24-Parganas, dated June 23, 1915.

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portion of that amount on the allegation that the said two cottas did not pass to the petitioner not having been comprised in his mortgage. Thereupon the latter put in an objection, and this dispute was referred to the Calcutta Improvement Trust Special Tribunal under the provisions of section 30 of the Land Acquisition Act read with those of the Calcutta Improvement Act (Beng. V of 1911). Dr. S. C. Banerji, the President of the said Tribunal, on the application of claimant No. 2 made an order on the 5th May 1915 calling for the record of the aforesaid mortgaged suit from the record-room of the District Judge, 24-Parganas, who, after some correspondence, refused to send the record on the ground that the said Special Tribunal was not a "Court" within the meaning of Order XIII, rule 10 of the Code of Civil Procedure. Thereupon claimant No. 2, on the 21st June 1915, made an application to the District Judge of the 24-Parganas praying that the said record might be sent to the President of the said Special Tribunal. Although the opposite party never raised any objection, this application was rejected on the 23rd June 1915, and the learned District Judge recorded an order declining to send the record on the ground that the said Special Tribunal was not a "Court". Being aggrieved by this order of the District Judge, 24-Parganas, claimant No. 2 moved the High Court and obtained this Rule.

Babu Mahendra Nath Roy (with him *Babu Gunada Charan Sen, Babu Manmatha Nath Roy* and *Babu Surendra Nath Das Gupta*), for the petitioner. I submit that under s. 53 of the Land Acquisition Act and s. 71 (c) of the Calcutta Improvement Act, 1911, the President of that Special Tribunal has the same powers as those possessed by a Civil Court under rule 10 of Order XIII of the Code of Civil

INSOLVENCY JURISDICTION.

Before Sanderson C. J., Woodroffe and Mukherjee JJ.

LAKHIPRIYA DASI

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v.

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RAIKISHORI DASI.*

Insolvency—Security for Costs—Appeal—Jurisdiction—Presidency Towns Insolvency Act (III of 1909) s. 8 (2) (b)—Civil Procedure Code (Act V of 1908) ss. 117, 151 and O. XLI, r. 10—Practice.

On an application to the Court of Appeal for security for costs in an appeal from an order of a Judge in insolvency —

Held, that the Court has jurisdiction to entertain the application under s. 117 and O. XLI, r. 10 of the Code of Civil Procedure, read with s. 8 (2) (b) of the Presidency Towns Insolvency Act

Sesha Ayyar v. Nagarathna Lala (1) not followed

APPLICATION. This was an application for security for costs in an appeal preferred against a judgment in insolvency passed by Chaudhuri J.

On the 7th September 1911, a suit was instituted on a *hitchitta* in the Court of Small Causes against Goberdhone Seal by his mother-in-law, Sreemutty Raikishory Dasi. On the 9th November, 1911 Goberdhone Seal purported to convey his one-third undivided share of the premises No. 20, Panchanan Pal's Lane, which was his sole asset, to his wife Sreemutty Sarbasundari Dasi. On the 20th February 1912 Raikishory Dasi obtained a decree in her suit. On the 27th February 1912, Goberdhone filed his petition in insolvency. By a conveyance dated the 12th October 1912.

Appeal from Original Order No. 61 of 1915.

(1) (1903) I. L. R. 27 Mysl. 121

Surendra Sekhsariait his wife and son carried the suit to the High Court of Calcutta and it was decided in favour of the plaintiff Laxhipriya Dasi. But the plaintiff was not satisfied with the decision and filed an application for revision. Governor-General's Secretary of Justice says that an order was passed by the 1st June 1913 at the instance of Raikishory Das, for his consolidated assets to file his schedule within a certain period. Thereupon on the 19th July 1913 the plaintiff filed his schedule estimating his assets at Rs. 1,111 and his liabilities at Rs. 2,525-1-3. The principal creditor was Raikishory Das whose claim was admitted to be Rs. 2,369-1-1. The public examination of the insolvent was held on the 2nd November 1913, in the course of which the conveyance of the 9th November 1911 was challenged as a colourable and fraudulent transaction. The application for the insolvent's discharge was fixed for hearing on the 7th July 1914.

On the 2nd July 1914, Raikishory Dasi filed a petition praying for a declaration that the transfers of the 9th November 1911 and the 12th October 1912 were inoperative and void, and that the property remained that of the insolvent, and for consequential relief. On the 31st July 1914, Lakhipriya Dasi filed her affidavit in opposition alleging that the transfers were made *bona fide* and for valuable consideration and claiming the property.

Evidence was taken and, on the 16th March 1915, Chaudhuri J. held and declared that the transfers were void as against the Official Assignee, and ordered Lakhipriya Dasi to make over possession of the one-third undivided share in the premises to the Official Assignee.

Against this judgment and order Lakhipriya Dasi preferred an appeal. Thereupon, Raikishory Dasi made the present application for security for costs.

Procedure, 1908, and can call for records from other Courts. I rely on the ruling in *Golap Coomary Dossee v. Raja Sundar Naraian Deo* (1) where the Court dealt with its administrative orders. Besides s. 15 of the Charter gives this Court ample powers to interfere in a case of this nature.

Babu Ram Charan Mitra, (*amicus curiae*), practically conceded that the President of the Special Tribunal could call for the records of other Courts.

HOLMWOOD AND MULLICK JJ. The question that is raised in this Rule is one of considerable importance to the public having dealings with the Special Tribunal constituted to hear cases from the orders of the Calcutta Improvement Trust. It is perfectly clear that some *modus operandi* must be devised by which the Tribunal may have access to Land Acquisition and other records that are necessary for the purposes of their business. But there appeared to be technical difficulties under the law. We, therefore, asked the learned Government pleader, Babu Ram Charan Mitra, to give us his assistance in the matter, and we have also heard the learned *vakil*, Babu Mahendra Nath Roy, for the petitioner, and it appears to us fairly clear that in the exercise of our powers of supervision under the Charter we ought to give directions to the lower Court in the same way in which a Bench of this Court appears to have done in the case of *Golap Coomary Dossee v. Raja Sundar Naraian Deo* (1). There the Court also dealt with the administrative orders of this Court. Now, as the shortest way to get over the difficulty we may point out that the Special Tribunal has been constituted a Court under the Land Acquisition Act, 1894, and under section 53 of that Act the Land Acquisition Court is governed by the

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It has always been the practice in this Court to entertain such applications. *Sesha Ayyar v. Nagarathna Lala* (1) has never been followed or referred to by this Court. Moreover, section 117 of the Code of Civil Procedure makes the provisions of Order XLI, rule 10 applicable to High Courts.

WOODROFFE J. This is an application for security for costs in an appeal against a judgment passed by Chaudhuri J., in insolvency. It is unnecessary to recapitulate the facts which are set out in the petition. The application is opposed both on grounds of law and fact. As regards the first question, the point is whether Order XLI, rule 10 applies to the case of an appeal from an order passed by a Judge in insolvency under Act III of 1909. Section 8 (b) of that Act states that an appeal shall lie in the same way, and be subject to the same provisions as an appeal from an order made by a Judge in the ordinary Original Civil Jurisdiction. The question then is, does the order apply to the latter case. No doubt the case of *Sesha Ayyar v. Nagarathna Lala* (1) answers this question in the negative. This case was decided prior to the present Code and has not been referred to nor followed so far as we are aware in this Court where the previous practice has been to entertain such applications: under section 117 of the Code its provisions apply to the High Courts save as provided in Parts IX and X. I am of opinion, therefore, that we have power to entertain and adjudicate this application under section 117 and Order XLI, rule 10, of the Code. This conclusion is in conformity with the previous practice under which such applications have been adjudicated. It cannot be reasonably held that this Court, when sitting in appeal from a decision

on the Original Side, is deprived of powers necessary to an effective jurisdiction admittedly existent on the Appellate Side of the same Court. For, if Order XLI, rule 10 does not apply, there is no other provision applicable, and in such a case it would be necessary to invoke the provisions of section 151. On the facts stated in the petition, and in particular on the findings of the learned Judge there stated, I am of opinion that security should be required of the appellant. The applicant is entitled to the costs of this application.

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SANDERSON C. J. I agree.

MOOKERJEE J. I agree.

J. C. *Application allowed.*

Attorney for the appellant: *J. N. Mitter.*

Attorneys for the respondent: *R. M. Chatterji & Co.*

APPELLATE CIVIL.*Before Mookerjee and Roe JJ.*

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May 6.

MADHUSUDAN SEN*v.***RAKHAL CHANDRA DAS BASAK.***

Principal and Agent—Suit for Accounts—Hypothecation of property as security for the proper discharge of his duties by the agent—Agreement to render accounts annually—Limitation Act (IX of 1908¹) Sch. I, Arts. 89, 115, 132—Death of the principal, effect of—Agent continuing in service of the heir—Contract Act (IX of 1872) ss. 207, 253, cl. (10)—Method to be adopted for rendering accounts.

Where certain immoveable properties were hypothecated to the principal by the defendant as security for the valid discharge of duty as agent, in a suit for accounts by the principal:

Held, that Art. 132 of the Limitation Act will apply, inasmuch as it is also by implication a suit to enforce a charge.

Hafeezuddin Mandal v. Jadu Nath Saha (1) followed.

Jogesh Chandra v. Benode Lal Roy (2) dissented from

On the death of the principal, an agency is terminated and a new agency is created if the agent continues in service of his principal's heir.

Where there is an agreement to submit accounts annually, in a suit against the agent for an account Art. 89, and not Art. 115, of the Limitation Act will apply.

Shib Chandra Roy v. Chandra Narain Mukerjee (3), and *Ashgar Ali Khan v. Khurshed Ali Khan* (4) followed.

Easin v. Baroda Kishore (5) dissented from

Duty of an agent does not end by merely submitting papers when

* Appeal from Appellate Decree, No 2236 of 1913, against the decree of Mahim Chandra Chakrabarty, Subordinate Judge of Dacca, dated May 19, 1913, reversing the decree of Hira Lal Mookerjee, Munsif of Munshiganj, dated May 7, 1912.

(1) (1908) I. L. R. 35 Calc 208. (3) (1905) I. L. R. 32 Calc 719.

(2) (1903) 14 C. W. N. 122 (4) (1911) I. L. R. 24 All. 27.

(5) (1909) 11 C. L. J. 43.

accounts are demanded but a failure to explain them when called upon to do so will amount to a refusal under Art. 89 of the Limitation Act.

Harrinath Rai v. Krishna Kumar Balshi (1) relied on.

Chand Ram v. Brojo Gobind (2), *Upendra Kishore v. Ramtara Debba* (3) not followed.

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SECOND APPEAL by Madhusudan Sen, the defendant.

In September 1895, the defendant was appointed agent by the plaintiffs and other co-sharers for the management of their estate. As a security for the due performance of his duties as agent, the defendant and his father executed a bond hypothecating certain immoveable properties in favour of persons owning half the estate, including the plaintiffs. Of these Radhika, Gobind and Keshab owned an one-eighth share each.

The plaintiff Rakhal Chandra, on behalf of himself and as guardian of his infant brother Brojo Gopal, held a similar one-eighth share. In 1900, Radhika died and his one-eighth share devolved upon the plaintiffs. In 1904 the agreement between the defendant and the plaintiffs was varied, the defendant undertaking to collect rents separately for the plaintiffs and to render accounts annually to them with regard to the one-fourth share which they now had. The defendant was discharged from office in August 1908 and the present suit was instituted in 1911 against the defendant claiming accounts from 1901 to 1908. The claim was resisted on merits as well as on the ground of limitation. The original Court dismissed the case, but the lower Appellate Court set aside the order of dismissal and passed a preliminary decree for accounts from 1901 to 1908. From this decision the defendants appealed to the High Court.

(1) (18-6) 1 L. R. 14 Calc 147. (2) (1872) 19 W. R. 14.

(3) (1909) 13 C. W. N. 695.

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Babu Gunuda Charan Sen (with him *Babu Ramesh Chandra Sen* and *Babu Surendra Nath Das Gupta*), for the appellant, contended that Article 132 of the Limitation Act which was a general section governing suits for the enforcement of liens was not applicable to this case as it was covered by the special provisions of Article 89. The test ought to be the nature of relief sought for, and not the mode in which relief was to be obtained, if and when granted: *Ashqar Ali Khan v. Khurshed Ali Khan* (1), *Jogesh Chandra v. Benode Lal* (2). The agency so far as Radhika was concerned terminated with his death and hence the plaintiffs cannot enforce it so far as Radhika's share, which devolved upon them, was concerned. Regarding what period of limitation was applicable, Article 115 and not Article 89 will apply as the accounts were agreed to be submitted from year to year: *Moti Lal v. Amin Chand* (3), *Easin v. Baroda Kishore* (4). Even if it is held that Article 89 was applicable the first alternative in the third column of the article will apply as there was demand made in the plaintiffs' letter of the 24th April 1909, non-compliance of which during the continuance of the agency will amount to a refusal: *Hari Narayan v. Administrator-General of Bengal* (5). Upon the pleadings the plaintiffs were bound to surcharge and falsify as the accounts had been admittedly submitted to them: *Chand Ram v. Brojo Gobind* (6), *Upendra Kishore v. Ramtara* (7).

Dr. Sarat Chandra Basak (with him *Babu Bipin Chandra Bose*), for the respondents, submitted that it was evidently a case of a charge: *Hafezuddin Mandal v. Judu Nath Saha* (8), *Troylokyo Nath*

(1) (1901) I. L. R. 24 All 27.

(5) (1878) 3 C. L. R. 446

(2) (1909) 11 C. W. N. 122.

(6) (1872) 19 W. R. 14.

(3) (1902) 1 C. L. J. 211.

(7) (1909) 13 C. W. N. 696

(4) (1909) 11 C. L. J. 43.

(8) (1908) I. L. R. 35 Calc. 298

Mandal v. Abinas Chandra Ray (1), *Sures Kanta v. Nawabali Sikdar* (2). The old agency did not terminate with the death of the principal as section 209 of the Indian Contract Act indicates that the duty of an agent does not end with the death of the principal as he has to take reasonable steps for the production and preservation of interest entrusted to him. If, however, it is held that a new agency was created than Article 89 of the Limitation Act will apply: *Shib Chandra Rai v. Chandra Narain* (3), *Jogendra Nath v. Debnath* (4), *Ashgar Ali Khan v. Khurshed Ali Khan* (5). But the period of limitation will be governed by the second alternative in the third column of that Article: *Jawahir Singh v. Lachman Das* (6) and *Nathubhai v. Debi Das* (7); even if these be repeated demands: *Chandra Madhab Barua v. Nobin Chandra Barua* (8).

MOOKERJEE AND ROE JJ. This is an appeal by the first defendant in a suit for accounts. The facts material for the decision of the questions of law raised before us may be briefly stated. On the 5th September 1895, the defendant was appointed agent of the plaintiffs and their co-sharers for management of their estate. The defendant and his father at the time hypothesized immoveable property as security for the due performance of the duty of the first defendant as agent. This bond was executed in favour of persons who were proprietors of a half share of the entire property. One of these, Radhika Mohan Das, was interested to the extent of one-eighth share; another, Rakhal Chandra Das, for himself and as guardian of his infant

(1) (1914) 21 C. L. J. 459.

(2) (1915) 21 C. L. J. 461.

(3) (1915) I. L. R. 32 Calc. 719.

(4) (1903) 8 C. W. N. 113.

(5) (1901) I. L. R. 24 All. 27.

(6) (1905) 9 C. W. N. 745.

(7) (1910) 12 Bom. L. R. 95.

(8) 1912 I. L. R. 40 Cal. 109.

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brother Brojo Gopal Das, was interested to the extent of another one-eighth share. Two other persons, Gobindlal Das and Keshablal Das, were each interested to the extent of one-eighth share. The proprietors of the remaining one-half share were not parties to the transaction, but it has been alleged—and that statement has not been challenged,—that the defendant was also their agent for the purpose of collection of rent. This arrangement continued in force till the 19th August 1904, when its terms were varied in the manner following, viz., the defendant undertook to collect the rent of one-fourth share separately and to submit separate collection papers in respect of that share year after year. In the interval, Radhika Mohan Das, had died in the year 1900 and his interest in the property had vested in Rakhal Chandra Das and Brojo Gopal Das; but there was no new contract in writing between these persons and the defendant, although the latter continued to act as their agent as previously. The defendant was discharged from his office on the 7th August 1908. This suit for account was commenced against him on the 7th August 1911 by the plaintiffs who are representatives of the one-fourth shareholder other than Gobind Lal Das and Kesab Lal Das. These latter have not joined as co-plaintiffs and have consequently been joined as *pro forma* defendants. The plaintiffs claim accounts for the period from the 14th April 1901 to the 7th August 1908. The claim is resisted by the defendant on the merits as also on the ground of limitation; he urges that he has rendered accounts and is under no further obligation to the plaintiffs, and further contends that, if this plea is not established, the claim is barred by limitation. The Court of first instance decided in favour of the defendant and dismissed the suit. Upon appeal, the Subordinate Judge has set aside that

decision and has made a preliminary decree for accounts from the 14th April 1901 up to the 7th August 1908. On the present appeal, it has been urged on behalf of the defendant that the entire claim is barred by limitation. In our opinion, this contention cannot possibly prevail.

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The defendant and his father hypothecated immoveable property as security for the due discharge of the duty of the defendant as agent of the plaintiffs and their co-sharers. The plaintiffs seek to realize from the defendant whatever sum may be found due to them on adjustment of accounts, by sale of the immoveable properties hypothesized. The suit is consequently one to enforce a charge on immoveable property within the meaning of article 132 of the Indian Limitation Act. This view is supported by the decisions in *Hafezuddin Mandal v. Jadu Nath Shaha* (1), *Trailakhyi Nath Mandal v. Abinash Chandra Ray* (2), *Sures Kanta Banerjee v. Nawab Ali Sikdar* (3), *Venkatachalian v. Narayana* (4). It has been pressed upon us, however, on behalf of the appellant that a contrary view is supported by the case of *Jogesh Chandra v. Benode Lal Ray* (5). But, as was pointed out in *Trailakhyi Nath Mandal v. Abinash Chandra Ray* (2), the case of *Hafezuddin Mandal v. Jadu Nath Shaha* (1) was not brought to the notice of the Division Bench that decided the case of *Jogesh Chandra v. Benode Lal Ray* (5); for this reason that decision was not followed either in *Trailakhyi v. Abinash* (2), or in *Sures Kanta v. Nawab Ali Sikdar* (3). In these circumstances, we adopt the view taken in *Hafezuddin Mandal v. Jadu Nath Shaha* (1) and hold that the claim of the plaintiffs

(1) (1918) I. L. R. 35 Calc. 292. (3) (1915) 21 C. L. J. 462.

(2) (1914) 21 C. L. J. 459. (4) (1914) 2nd M&I L J 140.

(5) (1909) 14 C. W. N. 122.

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in so far as they are in a position to enforce a lien on immoveable property is not barred by limitation. This brings us to the question, whether the plaintiffs are entitled to enforce a lien on immoveable property in respect of their entire claim.

On behalf of the appellant, it has been contended that when Radhika Mohan Das died in 1900, the agency of the defendant under him terminated. In support of this view, reliance has been placed upon section 201 of the Indian Contract Act, which provides that an agency is terminated by the death of either the principal or the agent. On behalf of the plaintiffs respondents, it has been argued that a contrary view may be supported by reference to the terms of section 209 which defines the duty of the agent on termination of the agency by the death of the principal. In our opinion, there is no foundation for this contention. Section 209 is in these terms : When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the production and preservation of the interest entrusted to him. This provision does not indicate that the agent continues to be the agent as he was before the death of the principal. If he continues to be the agent, no such provision as is embodied in section 209 is needed. On the other hand, if we contrast the provisions of section 253, which defines the effect of the death of any partner on a partnership, it becomes plain that under section 209 an agency is terminated by the death of the principal or the agent. Clause (10) of section 253 lays down that, in the absence of any contract to the contrary, partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner. In section 209 we miss the expression "in the absence of any contract to

the contrary" which finds a place in section 253. We hold accordingly that the agency of the defendant was terminated in 1900 with regard to the share of Radhika Mohan Das, and that thereafter a new agency was created by implication in respect of the share as between the defendant and the representatives of the deceased: *Mahendra Nath v. Jadu Nath* (1). In respect of the account of this share, consequently, the plaintiffs are not entitled to enforce a lien on moveable property under the terms of the original contract of the 5th September 1895. *Bepuri Lal v. Hara Kumar* (2), *Suresh Kanta v. Nawab Ali* (3).

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The question next arises, what period of limitation is applicable with regard to this portion of the claim of the plaintiffs. On behalf of the appellant it has been contended that Article 115 applies and that as on the 19th August 1901 the parties agreed that accounts would be submitted from year to year, there was a breach of obligation of the defendant at the end of each year, so that under Article 115, this portion of the claim is barred by limitation. In support of this view, reference has been made to the decisions in *Mati Lal v. Amin Chand* (4), *Easin v. Barada Krishna Acharyee* (5) *Jogesh Chandra v. Benode Lal* (6), and *Jhapajhannessa Bibi v. Bama Sundari* (7). The first three of the cases mentioned, no doubt, lend some support to the contention of the appellant. But it must be observed that, as pointed out in *Jhapajhannessa Bibi v. Bama Sundari* (7), there is a strong current of authority in the contrary direction. The cases of *Jogendra Nath Roy v. Deb Nath Chatterjee* (8),

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| (1) (1909) 9 C. L. J. 107 | (5) (1909) 11 C. L. J. 43 |
| (2) (1912) 21 C. L. J. 458 | (6) (1909) 14 C. W. N. 122 |
| (3) (1915) 21 C. L. J. 462. | (7) (1912) 16 C. W. N. 1042 |
| (4) (1902) 1 C. L. J. 211. | 16 C. L. J. 2-3 |
| | (8) (1903) 8 C. W. N. 112. |

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Shib Chandra Ray v. Chandra Nath Mukherjee (1), *Hafezuddin Mandal v. Jadu Nath Saha* (2), and *Chandra Bhisan Barua v. Nabin Chandra* (3) show that Article 89 is applicable to cases of this description. It is worthy of note that in the cases of *Fasim Sarkar v. Burada Kishore Acharjee* (4), and *Jogesh Chandra v. Benode Lal Ray* (5), attention of the Court was not invited to the decision of *Shib Chandra v. Chandra Nath* (1), where it had been pointed out, on a review of the earlier authorities including the decision of the Judicial Committee in *Asghar Ali Khan v. Khurshed Ali Khan* (6), that Article 89 is applicable to a suit for accounts by a principal against his agent. We may observe parenthetically that the appellant has argued that the case before the Judicial Committee was not in reality a suit by a principal against his agent. We are unable to give effect to this contention. The suit was brought by the then plaintiff for money in the hands of the defendant, who had consequently to account for the sum which he had taken and spent; and the Judicial Committee held that the suit was one for accounts governed by Article 89 of the Indian Limitation Act. We hold accordingly that Article 89 is applicable in respect of this portion of the claim of the plaintiffs.

We do not think it necessary to refer the question for the decision of a Full Bench of this Court, first, because the point is really concluded by the decision of the Judicial Committee in *Asghar Ali Khan v. Khurshed Ali Khan* (6); and, secondly, because the later decisions to the contrary did not take notice of the earlier decisions which are precisely in point. It

(1) (1905) I. L. R. 32 Calc. 719. (4) (1909) 11 C. L. J. 43.

(2) (1904) I. L. R. 35 Calc. 298. (5) (1909) 14 C. W. N. 122.

(3) (1912) I. L. R. 40 Calc. 108. (6) (1901) I. L. R. 24 All. 27.

is further worthy of note that Mr. Justice Coxe who reluctantly followed the decision in *Jyotesh Chandra v. Benode Lal Ray* (1) in *Jhapajhamessa Bibi v. Bamti Sundari* (2) was of opinion that the contrary view taken in *Shib Chandra v. Chandra Nath Mukerjee* (3) gave effect to the true intention of the Legislature.

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We now proceed to examine the effect of the application of Article 89 to the case before us. That article provides that a suit by a principal against his agent for moveable property received by the latter and not accounted for may be instituted within three years from the date when the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates. On behalf of the respondent it has been strenuously urged that the case is governed by the second alternative, namely, that time runs against the plaintiff from the date when the agency terminates. The reason for this contention is obvious, because if it prevails, the plaintiff would be entitled to accounts for the entire period claimed; for, as was pointed in *Sures Kanta Banerjee v. Nawab Ali Sikdar* (4), and the same view had been taken by the Judicial Committee by implication in *Thakur Jawahir v. Lachman Das* (5) and by the Bombay High Court in *Nathubhai v. Debi Das* (6), if the suit has been brought within three years, the plaintiff is entitled to accounts for the entire period of the agency. The appellant has fully appreciated the danger of this argument, and accordingly contended strenuously that the case falls within the first alternative, namely, that here the account was demanded and refused during the continuance of the agency. To substantiate this conten-

(1) (1910) 4 C. W. N. 122.

(2) (1912) 16 C. W. N. 142.

(3) (1905) I. L. R. 32 Cal. 712.

(4) (1915) 21 C. L. J. 462.

(5) (1905) 2 C. W. N. 745.

(6) (1910) 12 Bom. L. J. 283.

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tion, reliance has been placed upon a letter written admittedly by the plaintiffs to the defendant on the 24th April 1909. In this letter, it was stated that the defendant had submitted account papers for 1311 and 1312 but had not explained them. He was accordingly called upon to appear before the plaintiffs and explain, as soon as possible, the accounts up to the end of the year 1312. The defendant admittedly has not responded to this call. The question is, whether there has been a demand and refusal within the meaning of Article 89. Our attention has in this connection been invited to the cases of *Hari Narain Ghose v. The Administrator-General of Bengal* (1), *Easin Sarkar v. Barada Kishore Acharjee* (2) and *Chandra Mohan Barua v. Nabin Chandra Barua* (3). The cases of *Hari Narain Ghose v. The Administrator-General of Bengal* (1) and *Easin Sarkar v. Barada Kishore Acharjee* (2) show that if there has been a demand for accounts and the agent has not responded to the call, there is, by implication, a refusal within the meaning of Article 89. A different view appears to have been taken in *Chandra Mohan Barua v. Nabin Chandra Barua* (3). In that case, there were apparently repeated demands by the principal with which the agent had failed to comply. The Court held that as the demands were made while the business was in existence, limitation would run from the termination of the business. The facts of the case do not appear, however, fully either from the judgment or from the report; but, if this was intended as a formulation of a general principle applicable to all cases, we are unable to accept it as well-founded on principle. In our opinion, if there has been a demand, failure to respond to the demand is refusal

(1) (1878) 3 C. L. R. 146

(2) (1909) 11 C. L. J. 43.

(3) (1912) 1. L. R. 40 Calc. 108.

within the meaning of Article 89. There may, however, be cases where omission to render accounts may not be a refusal within the meaning of Article 89. To take one illustration, if the principal demands an account and the agent submits papers, there is not necessarily a refusal on the part of the agent to render accounts. But in the case before us, after the papers had been submitted, there was a further demand upon the agent to explain them. To this he failed to respond. In these circumstances, there was a refusal within the meaning of Article 89. Consequently, the claim for accounts up to 1312 in respect of the share of Radhika-Mohan Das, is barred by limitation. In respect of the accounts for the remaining period, there is nothing to show that there was a demand and refusal; consequently the claim for accounts from 1313 is governed by the second alternative in the third column of Article 115 and is not barred by limitation.

Finally, we have to deal with the question of the mode in which accounts should be rendered. On behalf of the defendant, the position has been maintained that as soon as the defendant as agent of the plaintiffs submitted his account papers, his duty was discharged and that the plaintiffs are under an obligation to examine these papers without his assistance. In support of this position, reliance has been placed upon observations in *Chandram v. Brojo Gobind Das* (1) and *Upendra Krishna Roy Chowdhury v. Ramtaran Debya* (2). We are unable to agree in the view put forward on behalf of the appellant. The duty of an agent when he is called upon to render accounts to his principal was explained by the Judicial Committee in the case of *Harinath Roy v. Krishna Kumar* (3). It is well-settled that his obligation towards his

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(1) (1872) 19 W. R. 14. (2) (1909) 13 C. W. N. 696

(3) (1886) I. L. R. 14 Calc. 147.

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principal does not terminate merely by the submission of account-papers, he is bound to explain those papers, and, if on accounts taken, it is found that he has in his hands money which belongs to his principal, he is bound to pay that sum. This principle has been recognised in a long series of cases: *Sushee v. Suleem* (1), *Alaiahmad v. Bibee Nuseeban* (2), *Annoda Pershad v. Dwarkanath* (3), *Ram Chunder v. Manick Chunder* (4), *Shib Chunder v. Chunder Narain* (5), *Ram Das v. Bhagwat Das* (6). But the defendant here has not explained the papers, at any rate, the papers subsequent to 1810 and, consequently, he must render accounts when they are taken by a Commissioner.

As regards the submission of the papers, it has been argued on behalf of the defendant that up to the time when collection was joint he had submitted some of the collection papers to the *pro forma* defendants and other papers to the proprietors of the 8 annas share known as the Guha Babus. The Court of first instance found that the papers had been so submitted and in this view the defendant is under no obligation to submit papers again to the plaintiffs. It is plain in so far as the papers relating to the time during which the collection was joint are concerned, that it is a matter between the landlords themselves and steps must be taken by the Court, at the instance of the plaintiffs, to compel the *pro forma* defendants and the Guha Babus to produce the papers which were made over to them by the defendant. The powers of the Court in this respect are ample and have certainly not been exhausted; every endeavour must be made by the Court below to obtain the papers from those persons.

(1) (1874) 22 W. R. 191.

(1) (1881) I. L. R. 7 Calc. 428.

(2) (1875) 24 W. R. 70.

(5) (1905) I. L. R. 32 Calc. 719.

(3) (1881) I. L. R. 6 Calc. 751.

(6) (1904) 1 All. L. J. 347.

But, we desire to make it clear that the defendant cannot be held responsible for the production of the papers, if they are not produced by the persons to whom they were submitted by him.

There remains only one other point for consideration. On behalf of the defendant it has been urged that the trial Court found expressly in his favour that the papers up to 1310 had not only been submitted but explained. Upon this point, the Subordinate Judge has not come to an explicit finding. One fact, however, is patent, namely, that the co-sharers of the plaintiffs are satisfied with the accounts up to the end of 1310; they, at any rate, have not put forward a claim in respect of the accounts for that period. In view of the special circumstances of this case, we hold that in respect of the accounts up to the end of 1310, the plaintiffs must establish that the accounts have not been explained to them by the defendant. If they make this out to the satisfaction of the Court below, the defendant must explain the papers before the Commissioner. But in respect of the period subsequent to 1310 the defendant is clearly under an obligation to produce such papers as have not already been produced and to explain all the papers to the satisfaction of the Court.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge varied in the manner following. The plaintiffs will have a decree for accounts against the defendant in respect of one-eighth share for the entire period claimed in the suit, and for the sum which may be found due on account of this share, they will be allowed to enforce their claim by sale of the immoveable properties hypothesized. In respect of the one-eighth share originally vested in Radhika Mohan Das, the claim for accounts is dismissed up to the 13th April 1906 (that is up to

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the end of the year 1312). But the plaintiffs are entitled to an account in respect of that share for the period commencing with the 14th April 1906 (corresponding to the 1st Baisakh 1313) up to the date of the termination of the agency on the 7th August 1908. In respect of any sum which may be found due to the plaintiffs with regard to this share, the plaintiffs will have a money decree against the defendant. Steps will be taken by the Court below to compel the *pro forma* defendants and the proprietors of the one-fourth share who are not parties to this suit, to produce such papers as were placed in their hands by the defendant. The defendant will explain the accounts subsequent to 1310 and he will produce such papers as have not already been filed by him. In respect of the accounts antecedent to 1310, the plaintiffs must establish to the satisfaction of the Court that they have not been explained by the defendant; and the defendant will be called upon to explain the accounts antecedent to 1310, only if the plaintiffs establish this. If the Court fails to secure the production of the papers made over to the co-sharers of the plaintiffs, the accounts covered thereby will be taken, only if the plaintiffs are able to place other relevant materials before the Commissioner; if the plaintiffs fail to do so, the accounts covered thereby will not be taken. Each party will pay his costs in this Court. The costs in the Court of first instance and before the Subordinate Judge, as also the costs of the accounts now directed will abide the ultimate result of the suit.

N. C. S.

Appeal allowed in part.

APPELLATE CIVIL.

Before Mookerjee and Neelbould JJ.

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* Sale—Execution of rent-decree—I encumbrances—Bengal Tenancy Act (VIII of 1885), ss. 159, 163 to 167—Decree for arrears of rent—Sale under the Bengal Tenancy Act, effect of—Purchase by landlord.

Where a tenure is sold under the provisions of the Bengal Tenancy Act in execution of a decree for arrears of rent, and the procedure prescribed in the Act has been observed, the result therein described follows, namely, the purchaser becomes entitled to annul all encumbrances other than registered and notified encumbrances; the consequence of the sale does not depend upon the amount of the bid offered by the successful purchaser, it is independent of the value of the bid. Section 165 of the Act was enacted solely for the benefit of the decree-holder, if the bid is not sufficient to satisfy his decree and costs, it entitles him to have the property sold with power to annul all encumbrances; but it is not obligatory upon him to adopt this extreme measure, and he is not in peril if he decides not to pursue this special remedy.

Banbhari Kapur v. Khetra Pal Singh Roy (1) not followed.

SECOND APPEAL (No. 2539 of 1912) by Nawab Sir Salimullah Bahadur and others, the plaintiffs.

The plaintiffs were the superior landlords of a *nim osat* taluk, and obtained a decree for arrears of rent on the 7th April 1909 against the talukdars; and on the 5th August 1909, they applied to execute the decree in accordance with the provisions of the Bengal Tenancy

* Appeal from Appellate Decree, No. 2539 of 1912 against the decree of Ramesh Chandra Sen, Subordinate Judge of Backergunge, dated July 20, 1912, reversing the decree of Ratna Chandra Banerjee, Munsif of Patuakhali, dated Feb. 28, 1912.

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On the 18th April 1911, the plaintiffs commenced this action in ejectment against the defendants. The Court of first instance decreed the suit, but this decision upon appeal was reversed by the lower Appellate Court on the ground that although the sale was held under the Bengal Tenancy Act, it operated only as a sale under the provisions of the Code of Civil Procedure, and the decree-holders had therefore acquired nothing beyond the right, title and interest of the judgment-debtors.

This decision was based on the ground that as the sum realised on the sale was not sufficient to liquidate the amount of decree and costs, the sale could not be deemed to have been held under s. 161 of the Bengal Tenancy Act, but under the provisions of the Civil Procedure Code. In support of his view, the Subordinate Judge referred to the case of *Banbihari Kapur v. Khetra Pal Roy Choudhury* (1).

Against this decision the plaintiffs appealed to the High Court.

Babu Surendra Nath Guha, for the appellants.

Babu Gunada Charan Sen, for the respondents.

MOOKERJEE AND NEWBOULD JJ. This is an appeal by the plaintiffs in a suit for declaration of title to

land and for recovery of possession thereof. The plaintiffs are the superior landlords of a *nim osat taluk*. The talukdars defaulted to pay rent, with the result that they were sued and a rent decree was obtained against them on the 7th April 1909. On the 5th August 1909, the plaintiffs applied to execute the decree in accordance with the provisions of the Bengal Tenancy Act; five days later, an order was made for the simultaneous issue of the writ of attachment and the sale proclamation under sub-section (1) of section 163. The sale was held under sub-section (1) of section 164 on the 23rd September, when the decree-holders themselves purchased the defaulting tenure. The sale was confirmed in due course and symbolical delivery was made to the purchasers. They could not, however, obtain actual possession of the land, as they were resisted by the defendants who set up under-tenures in the property sold. The plaintiffs, thereupon, took proceedings under section 167 of the Bengal Tenancy Act and the requisite notices for the annulment of the alleged encumbrances were duly served. On the 18th April 1911, the plaintiffs commenced this action to eject the defendants. The Court of first instance found that the decree was for arrears of rent, that it had been executed in accordance with the provisions of the Bengal Tenancy Act, that at the sale held under sub-section (1) of section 164, the purchasers had acquired the tenure with power to annul the encumbrances thereon, other than registered and notified encumbrances, and that steps had been taken in conformity with section 167 to annul the encumbrances set up by the defendants. In this view, the Court decreed the suit. Upon appeal, the Subordinate Judge has reversed that decision on the ground that the sale, though held under the Bengal Tenancy Act, operated only as a sale under the provisions of the Code of Civil

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Procedure, and that the decree-holders auction-purchasers had acquired nothing beyond the right, title and interest of their judgment-debtors. This decision is based on the ground that as the sum realised at the sale, was not sufficient to liquidate the amount of the decree and costs, the sale must be deemed to have been held, not under sub-section (1) of section 164, but under the provisions of the Code of Civil Procedure. The Subordinate Judge, in this view, has dismissed the suit. On the present appeal, it has been argued on behalf of the plaintiffs that the view taken by the Subordinate Judge as to the effect of the sale held on the 23rd September 1909, is erroneous and that the purchasers at that sale acquired the defaulting tenure with power to annul all encumbrances other than registered and notified encumbrances. This view has been controverted by the respondents, on the authority of the decision in *Banbihari Kupur v. Khetrapal Singh Roy* (1). It has been, indeed, broadly argued on their behalf that a sale in execution of a decree for arrears of rent operates as a sale under sub-section (1) of section 164, only if the sum realised at the sale is sufficient to liquidate the amount of the decree and costs. We feel no doubt that this contention is erroneous and is not supported by the provisions of the Bengal Tenancy Act.

Section 159 formulates the fundamental principle that where a tenure or holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as protected interests, but with power to annul the interests defined as encumbrances. Section 163 provides that when the decree-holder makes the application for execution mentioned in section 162, the Court, if it admits the application and orders

execution of the decree as applied for, shall issue simultaneously the order of attachment and the proclamation required by rules 66 and 70 of Order XXI
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of the Civil Procedure Code. Sub-section (2) of section 163 lays down that the proclamation shall announce that the tenure or holding will first be put up to auction, subject to the registered and notified encumbrances, and will be sold subject to those encumbrances, if the sum bid is sufficient to liquidate the amount of the decree and costs, and that, otherwise, it will, if the decree-holder so desires, be sold on a subsequent date of which due notice will be given, with power to annul all encumbrances. Subsection (1) of section 164 provides that when a tenure has been advertised for sale under section 163, it shall be put up to auction, subject to registered and notified

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Procedure, and that the decree-holders auction-purchasers had acquired nothing beyond the right, title and interest of their judgment-debtors. This decision is based on the ground that as the sum realised at the sale, was not sufficient to liquidate the amount of the decree and costs, the sale must be deemed to have been held, not under sub-section (1) of section 164; but under the provisions of the Code of Civil Procedure. The Subordinate Judge, in this view, has dismissed the suit. On the present appeal, it has been argued on behalf of the plaintiffs that the view taken by the Subordinate Judge as to the effect of the sale held on the 23rd September 1909, is erroneous and that the purchasers at that sale acquired the defaulting tenure with power to annul all encumbrances other than registered and notified encumbrances. This view has been controverted by the respondents, on the authority of the decision in *Banbihari Kupur v. Khetrapal Singh Roy* (1). It has been, indeed, broadly argued on their behalf that a sale in execution of a decree for arrears of rent operates as a sale under sub-section (1) of section 164, only if the sum realised at the sale is sufficient to liquidate the amount of the decree and costs. We feel no doubt that this contention is erroneous and is not supported by the provisions of the Bengal Tenancy Act.

Section 159 formulates the fundamental principle that where a tenure or holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined as protected interests, but with power to annul the interests defined as encumbrances. Section 163 provides that when the decree-holder makes the application for execution mentioned in section 162, the Court, if it admits the application and orders

execution of the decree as applied for, shall issue simultaneously the order of attachment and the proclamation required by rules 66 and 70 of Order XXI of the Civil Procedure Code. Sub-section (2) of section 163 lays down that the proclamation shall announce that the tenure or holding will first be put up to auction, subject to the registered and notified encumbrances, and will be sold subject to those encumbrances, if the sum bid is sufficient to liquidate the amount of the decree and costs, and that, otherwise, it will, if the decree-holder so desires, be sold on a subsequent date of which due notice will be given, with power to annul all encumbrances. Subsection (1) of section 164 provides that when a tenure has been advertised for sale under section 163, it shall be put up to auction, subject to registered and notified encumbrances; and if the bidding reaches a sum sufficient to liquidate the amount of the decree and costs including the costs of sale, the tenure shall be sold subject to such encumbrances. The respondents argue that if the bid does not reach a sum sufficient to liquidate the amount of the decree and costs, the sale, if concluded, operates only as a sale under the provisions of the Code of Civil Procedure, with the consequence that the purchaser acquires merely the right, title and interest of the judgment-debtor. We are clearly of opinion that this contention is not wellfounded. If we were to accept the contention of the respondents, we would have to read into sub-section (1) words which are not to be found there. The intention of the Legislature, as can be gathered from sections 163, 164 and 165, is to entitle the decree-holder, if he so desires, to proceed under section 163 in the event of the sale on the first notification not realising a sum sufficient to liquidate the amount of the decree and costs. It is not obligatory

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upon him, however, in this contingency, to avail himself of the provisions of section 165; he may nevertheless be content with the sale under section 164; and if the sale is held under that section, the result described therein follows, namely, the purchaser becomes entitled to annul all encumbrances other than registered and notified encumbrances, provided he follows the procedure prescribed in section 167. The consequence of the sale does not depend upon the amount of the bid offered by the successful purchaser; it is independent of the value of the bid. It is obvious that section 165 was enacted solely for the benefit of the decree-holder; if the bid is not sufficient to satisfy his decree and costs, it entitles him to have the property sold, with power to annul all encumbrances; but it is not obligatory on him to adopt this extreme measure, and he is not in peril if he decides not to pursue this special remedy.

We have been pressed, however, to adopt the contrary view on the strength of some observations in the case of *Banbihari Kapur v. Khetrapal Sing Roy* (1) which support the contention of the respondents. With all respect for the learned Judges who decided that case, we are unable to accept their view as a correct exposition of the law on the subject. But we do not think it necessary to refer the matter for decision to a Full Bench, because the observations mentioned were not necessary for the purpose of the decision of that case. It further appears that in that case the sale certificate stated that the purchaser had acquired merely the right, title and interest of the judgment-debtor, while in the case before us, the sale certificate shows on the face of it, that the purchaser acquired the defaulting tenure itself which had been

brought to sale. In our opinion, the view taken by the Subordinate Judge cannot possibly be supported.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs both here and in the Court of appeal below.

W. M. C.

Appeal allowed.

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APPELLATE CIVIL.

Before Mookerjee and Roe JJ.

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v.

May 21.

HARADAS ACHARJYA CHOWDHURY.*

Deposit in Court—Money paid under compulsion of Law—Want of bona fides—Action for recovery of money—Civil Procedure Code (Act V of 1908), O. XXI, r. 46 cl (1)—Attachment of debt due to a stranger on the allegation that the garnishee's creditor was benamidar of the judgment-debtor—Deposit by garnishee, conditional, on enquiry—Withdrawal of the money from Court by the attaching creditor without notice to the garnishee—Court's power of enquiry.

Where debt due to a stranger was attached on the allegation that he was benamidar of the judgment debtor and the attaching creditor withdrew the money by leave of the Court without notice to the garnishee, in a suit by the latter for the recovery of the money deposited, it being found that there was no benami transaction as alleged :

Held, that the rule that money paid under compulsion of a legal process was irrecoverable can only be pleaded where the party who has got the benefit of his opponent's payments, acts *lond fide*.

Marriott v. Hampton (1) distinguished.

Ward & Co. v. Wallis (2) followed.

* Appeal from Appellate Decree No. 3656 of 1913, against the decree of Annada Kumar Sen, Subordinate Judge of Mymensingh, dated Aug. 11, 1913, confirming the decree of Lutfar Itahaman Munif of Mymensingh, dated July 17, 1912.

(1) (1797) 7 T. R. 269.

(2) [1900] 1 Q. B. 675

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Clause (3) r. 46 of O. XXI of the Civil Procedure Code does not contemplate of cases where the deposit was purely conditional on enquiry being held as to judgment-debtors' rights and a withdrawal by the attaching creditor of the money so conditionally deposited, without notice to the garnishee, even though made with the leave of the Court, is a grave abuse of judicial process.

It is true that O. XLVI does not expressly contemplate of an enquiry as is enjoined in O V., rule 45 of the Rules of the Supreme Court in England, but the Court has inherent power to enquire. *

SECOND APPEAL by Harinath Chowdhury, the defendant.

The defendant, Harinath Chowdhury, sued one Benoychand Kotary for money due and got an *ex parte* decree. He attached a debt due on a hand-note by the plaintiff to Rai Manilal Nahar Bahadur on the allegation that the latter was benamidar of Benoy. The plaintiffs deposited the money in Court but an order was passed by the Court to the effect that money was not to be paid out to the defendant until the question of benami had been decided. Subsequently Rai Manilal brought a suit on the hand-note against the plaintiff and obtained a decree, it being found that Rai Manilal was not Benoy's benamidar. The defendant had in the meantime withdrawn the money deposited in Court by the plaintiff without notice to him though with the leave of the Court and before any enquiry as to the benami had been gone into. The plaintiff thereupon sued for the recovery of the money which he had deposited and which had been withdrawn by the defendants. Both the lower Courts found in favour of the plaintiff. Hence this second appeal by the defendant.

Mr. A. B. Guha (with him *Babu Birendra Kumar De* and *Babu Akhil Bandhu Guha*), for the appellants, contended, that money paid into Court under compulsion of a legal process was irrecoverable [*Marriott*

v. *Hampton* (1)] even if he paid under a mistake of fact or obtained a fraudulent judgment unless such a judgment was set aside : *De Medina v. Grove* (2). The plaintiff has no cause of action as O. XXI, r. 46, cl. (3) of the Civil Procedure Code gives a valid discharge of his debt. At most, Rai Manilal can bring an action in tort for fraudulent misrepresentation against the defendant. Money paid into Court was not plaintiff's but his creditor's money. By suffering a judgment to be passed, the plaintiff cannot create a right in himself. Sections 69 to 72 of the Indian Contract Act have no application to the facts of this case.

Babu Jyoti Prasad Sarbadhikari and *Babu Prokash Chandra Majumdar*, for the respondents, were not called upon.

MOOKERJEE AND ROE JJ. The problem which requires solution in this appeal may be concisely stated. On the 30th June, 1909, A sued B for recovery of money. On the same day A obtained an order for attachment before judgment under rule 5 of Order XXXVIII of the Code of Civil Procedure. The property attached was a debt due ostensibly from C to D ; but the debt was attached on the allegation that B and not D was the person beneficially interested in it. The result was that a prohibitory order was issued upon C on the 13th August, 1909. A obtained an *ex parte* decree in his suit against B C was then called upon to pay into Court the money due from him ostensibly to D. On the 8th October, C applied to the Court and intimated that he was willing to bring the money into Court, provided he was absolved from liability to pay a second time to D, and provided also that interest ceased to run upon his debt from that date. The Court, thereupon, ordered that the

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money, if deposited, would be retained in Court till the adjudication of the question, whether B or D was beneficially interested therein. On the faith of this order, the money was brought into Court on the 13th December 1909. Thereafter, without notice to C or D, the Court, on the application of A, paid out the money to him. D, who had no intimation of these proceedings, subsequently sued C and recovered judgment against him on the debt. C now sues A to recover the money, which he had deposited in Court and which, without notice to him or to his creditor D, had been withdrawn by A. The Courts below have decided the claim and A has appealed to this Court. The substantial question in controversy on the merits in this litigation, consequently, plainly is, whether B or D was beneficially interested in the debt. The Courts below have concurrently answered this against A, and have found that B had no interest in the money, in other words, that not B but D was the real creditor of C. This is a finding of fact which cannot be successfully challenged in second appeal; indeed, no attempt has been made to assail it before us; but the question has been mooted, has C any cause of action against A? On behalf of A, it has been argued that there is no cause of action, *first*, because the money was recovered under compulsion of legal process, and cannot accordingly be recovered by any form of suit; and, *secondly*, because by virtue of Order XXI, rule 46¹ of the Code of Civil Procedure, the money, as soon as deposited, ceased to be the money of the plaintiff, and, that, consequently, he is not entitled to recover it back. In our opinion, there is no foundation for either of these contentions.

As regards the first ground, it is clear that the principle of the rule in *Marriott v. Hampton*(1),

(1) (1797) 7 T. R. 269; 2 Sim. L. C., 10th Ed., 420.

which has been the bulwark of the argument for the appellant, is of no real assistance to his cause. The principle is that where money has been paid by the plaintiff to the defendant under compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. The foundation of this doctrine was thus stated by Lord Kenyon: "After a recovery by process of law, there must be an end of litigation; otherwise there would be no security for any person." To the same effect is the observation of Grose J.: "It would tend to encourage the greatest negligence, if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." Lawrence J. added that if the case alluded to, that is, the decision of Lord Mansfield in *Moses v. Macferlaan* (1), be law, it would go the length of establishing this, that every species of evidence which was omitted by accident to be brought forward at the trial, might still be of avail in a new action to overrule the former judgment, which is too preposterous to be stated. The principle was again formulated by Patteson J. in *Cadaval v. Collins* (2): "Money paid under compulsion of law cannot be recovered back as money had and received. And, further, where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." We refer to this statement in order to emphasize the qualification to the general rule formulated in the following terms by Kennedy J. in *Ward & Co. v. Wallis* (3): "There must be *bona fides* on the part of the party who has got the benefit of his opponent's payment in order to bring the

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(1) (1759) 2 Burr 1009

(2) (1836) 1 A. & E. 859, 866.

(3) [1906] 1 Q. B. 675.

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principle laid down in that case [*Marriott v. Hampton* (1)] into force; if the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down in *Marriott v. Hampton* (1) may not prevent the defendant from recovering the money back."

Let us examine the application of this principle to the circumstances of the present case. Here money was deposited by the plaintiff C on the faith of an order which stated explicitly that the money would be retained in Court, pending the determination of the question, whether the money belonged to B, the then judgment debtor of A, or to D the alleged creditor of the depositor C. That enquiry was never made; but the Court, without notice to the depositor and his alleged creditor, paid out the money to the present defendant, on his application, so that neither C nor D was allowed an opportunity to defend his rights. We need not hold that this conduct of A was in any way designedly fraudulent, but this much is plain that he was able to appropriate the money by what constituted a grave abuse of the process of the Court. The principle of the decision in *Marriott v. Hampton* (1) has no application to these circumstances.

As regards the second ground, it is contended that under Order XXI, rule 46, the money, as soon as it was deposited, ceased to be the money of the depositor. Clause (3) of rule 46 is in these terms: A debtor prohibited under clause (1) of sub-rule (1) may pay the amount of his debt into Court and such payment shall discharge him as effectually as payment to the party entitled to receive the same. This clearly contemplates a case where there is no dispute that if the suit

results in a decree against the defendant, or if there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor. In the present case, the deposit was clearly conditional. The order of the Court makes it plain beyond all controversy that the deposit was made pending the adjudication of the question, whether B or D was beneficially interested in the money. But it has been contended on behalf of the appellant that this order was irregular, as the Code neither contemplates an enquiry, nor provides for the issue of notices upon parties affected by its order. This argument overlooks the elementary principle that no judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights. Our attention has been drawn in this connection to rule 5 of Order XLV of the rules of the Supreme Court in England. An examination of that rule shows that there is no foundation whatever for the contention of the appellant. There the rules expressly provide for an enquiry in the events which have happened here. Rule 5 is in these terms: "Whenever in any proceedings to obtain an attachment of debts, it is suggested by the garnishee that the debt sought to be attached belongs to some third person or that any third person has a lien or charge upon it, the Court may order such third person to appear and state the nature and particulars of his claim upon such debt." Rule 6 then provides that after the allegation of any third person under such order as in Rule 5 mentioned and if any other person who by the same or any subsequent order may be ordered to appear or in case of such third person not appearing when ordered, the Court may order execution to issue to levy the amount due from such garnishee. Consequently, the Rules of the Supreme Court in England contemplate, not an *ex parte* order to the

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prejudice of third persons who may be really interested in the debt due from the garnishee, but an enquiry in the presence of all the persons interested. Our Code does not contain any specific rule of the type of Rules 5 and 6 of Order XLV of the Rules of the Supreme Court in England. But the Court has inherent power to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings. In the case before us, the Court was competent, indeed, it was incumbent upon the Court, to make a conditional order of this description and to provide that the money deposited was not paid to the decree-holder till adjudication of the question of title to that money. Reference may in this connection be usefully made to the instructive decision of the Court of Appeal in *Roberts v. Death* (1). In that case the garnishee, who was ordered to bring the money into Court, contended that the money was due to the judgment-debtor, not in his personal capacity but in his capacity as a trustee. The question arose, whether the money, if deposited, should be paid without enquiry. Lord Justices Brett, Cotton and Lindley unanimously held that it would not be right to make the payment without an enquiry into the question, whether the money was trust-money or not, and they directed that the money should be brought into Court to abide the event of an enquiry. In our opinion, the money deposited in this case did not cease to be the money of the plaintiff, merely because he had brought it into Court on the faith of a conditional order which directed its retention in Court pending enquiry into the question raised.

We feel no doubt whatever that the justice of the case lies entirely with the respondent and that the

Court has full authority to compel the appellant to bring back the money into Court to be repaid to the plaintiff [*Mrinalini v. Abinas* (1)].

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

N. C. S.

Appeal dismissed.

(1) (1910) 11 C. L. J. 533

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CRIMINAL REVISION.

Before Sharfuddin and Chapman JJ

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v.

July 26

EMPEROR.*

Special Constable—Dispute regarding ferry—Proceeding for security to keep the peace drawn up against one party—Appointment of members thereof as special constables.—Refusal to act as such—Legality of appointment and of prosecution for such refusal—Police Act (V of 1861) ss. 17, 19.

The only legitimate object of appointing special constables, under s. 17 of the Police Act (V of 1861), is to strengthen the ordinary police force by the addition of suitable persons. When the appointments are not made with such an object, a prosecution under s. 19 of the Act for refusal to act as such will not be permitted.

When the members of one party to a ferry-dispute were appointed as special constables, and the circumstances showed that it was never really intended to utilize them as police officers, the High Court quashed the order of the District Magistrate directing their prosecution under s. 19 of the Act and the issue of warrants against them.

On the 14th April 1915, one Rambirich Singh and

*Criminal Revision, Nos. 794, 797 to 816 of 1915, against the order of D. Weston, District Magistrate of Muzaffarpur, dated May 26, 1915.

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his son, claiming to be lessees of two Government ferries at Itwa and Dih ghats in Barpadawna and Khanwa respectively, presented a petition to the District Magistrate of Mozafferpur, alleging that, in January last, the neighbouring villagers had looted the ferries, but that the matter had then been amicably settled; that in the beginning of March they had again plundered the huts-and boats at the ferry ghats, in consequence of which two complaints had been filed against some of the leaders who were put on trial; that the police had sent up the ringleaders under s. 107 of the Criminal Procedure Code, and proceedings thereunder had been drawn up against them, that the villagers nevertheless continued their hostility, and that, unless the petitioner, Pardip Singh, and the other 36 persons named were made special constables, or the ferries guarded by armed police, the villagers could commit serious breaches of the peace.

On receipt of the petition, the District Magistrate called for a police inquiry and report, observing as follows. "I am quite prepared to make special constables pending disposal of the s. 107 cases, and afterwards, if necessary, to run more in under s. 107." On the 28th April, Dwarka Nath Panday, an Inspector of police who was deputed to hold an investigation, submitted his report to the same Magistrate stating that the lessees of the ghats had for some years levied *sati* (annual payment in grains in lieu of toll) from the neighbouring villages, that the *sati* had been recently enhanced; that one Ramautar Singh, a local zamindar, had refused to pay the same and had combined with the villagers and certain influential men, including the petitioner Pardip, to stop the ferry business; that the villagers had demolished the lessees' huts at the ferry ghat on 12th January 1915, which were subsequently rebuilt, and had again collected

together on 1st March to destroy the huts; and that proceedings under s. 107 of the Criminal Procedure Code had been taken against Ramautar and others which were pending in Court. The report further continued as follows:—

"I believe that the appointment of special constables is essential. . . . The matter cannot be set right unless special police are appointed, and I suggest that one head constable and four constables from the Reserves be, in the meantime, deputed there. There have been a series of breaches of the peace and they are still apprehended, and cannot be set right until the 27 persons named (who were the same as those mentioned in Rambirich's petition) are appointed as special police, under Act V of 1861 s. 17, for one year to see that there is no breach of the peace."

On the 4th May, the District Magistrate recorded an order expressing his willingness to make the specified persons special constables for three months, which would (he remarked) give time for the disposal of s. 107 cases, but called for a further report from the Inspector as to the local limits within which the special constables were to act. On receipt of the further report, the District Magistrate passed the following order on 9th May "Report received. Proceedings drawn up. To District Superintendent of Police for action." Thereafter, on the 19th, the petitioners and the others, named in the Police report, presented a petition to the District Magistrate in which they claimed to be the *maliks* of Dih Jiwari and contiguous villages, and stated that there was a dispute between the said *maliks* and the *qhatwal* of Kunwa concerning the Dih Jiwari ferry, and submitted that it would be inequitable if they were ordered to do anything to destroy their own rights.

Six of the petitioners were then offered certificates, belts and other equipments, but they refused to accept them. This fact was communicated to the District Magistrate by a police report, on the 25th May, and he thereupon rejected the petitioner's application and

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passed the following order on the 26th—"Prosecute each separately." On the 28th May, when the 27 persons were present in Court as accused in the s. 107 cases, the remaining ones were offered but refused certificates and belts. The matter was reported to the District Magistrate who directed their prosecution also. The Joint Magistrate, thereupon, issued processes against the petitioner and the others under s. 19 of the Police (Act V of 1861). No instructions for the performance of police duties had been issued to any of the persons appointed as special constables.

The petitioner then moved the High Court and obtained the Rule to set aside the order of the District Magistrate directing his prosecution and the proceedings thereunder on the second and third grounds of the petition, which were as follow :—

(ii) That the only legitimate object of appointing special constables under s. 17 of Act V of 1861 being to strengthen the ordinary police force, the District Magistrate was wrong in appointing the petitioner as such on the complaint of a private person and on a police report which did not disclose that the ordinary police force was insufficient, and that the petitioner committed no offence by refusing to act as such.

(iii) That s. 17 does not contemplate the appointment of a party to a quarrel as special constable, and the petitioner committed no offence in refusing to accept the appointment.

Similar Rules were issued on behalf of twenty other petitioners and they were heard together.

Mr. W. Gregory (with him *Babu Birbhusan Dutt*), for the petitioner. The proper object of s. 17 is to strengthen the ordinary police force when insufficient to meet an emergency, and not to influence parties to a dispute to preserve the peace : *Gopinath Paryah v. Empress* (1), *Umes Chandra Gupta v. Emperor* (2), *Nanda Kishore Singh v. Emperor* (3). The police

(1) (1886) 10 C. W. N. 82. (2) (1906) 10 C. W. N. 322.
(3) (1908) I. L. R. 35 Calc. 454

report on which the Magistrate made the appointments does not show that the ordinary police force was insufficient. The orders directing the prosecution and the issue of warrants are illegal, and the High Court can set them aside on revision.

Mr. S. Ahmed (*Deputy Legal Remembrancer* for Bihar). The order of appointment of special constables is an executive one and the High Court cannot interfere with it. That the ordinary police force was insufficient is shown by the Inspector asking for the immediate appointment of constables from the Reserve.

[He subsequently informed the Court that if their Lordships considered the prosecutions ill-advised, they would be dropped.]

Cur. adv. vult.

SHARFUDDIN AND CHAPMAN JJ. These twenty-one Rules have been heard together. They were issued to show cause why the orders directing the prosecution of the petitioners upon the charge of refusing to serve as special constables should not be set aside.

The petitioners live in four villages adjoining two ferries named Dih ghat and Itwa ghat, lease of which is held by a certain Rambirich and his son under the District Magistrate and District Board of Mozafferpur. These ferry farmers complained that in January and March last there had been riotous disturbances over their use of the ferry, and in consequence proceedings were instituted against thirteen of the present petitioners under section 107 of the Code of Criminal Procedure for the purpose of binding them down to keep the peace. During the pendency of these proceedings, the ferry farmers, on the 14th April, again complained that the villagers did not allow them to

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ply the ferry and prayed that certain persons named by them should be made special constables. The names given include all the present petitioners. The District Magistrate directed the District Superintendent of Police to depute an Inspector to enquire into the matter, intimating at the same time his willingness to appoint special constables. The Inspector reported that the disturbances had been due to the enhancement of the ferry tolls. He recommended that the persons named by the ferry farmers be appointed special constables, and that in the meantime a head constable and four constables be deputed from the Reserve. A head constable and four constables were accordingly deputed, and eventually, on the 10th May, the District Magistrate recorded an order appointing twenty-seven persons to serve as special constables within a certain area in the neighbourhood of the ferries. These twenty-seven persons were the persons originally named in the complaint of the ferry farmers and included the petitioners against some of whom, as we have said, proceedings under section 107 had then been pending for a considerable time. The petitioners heard of this order, and before it was formally communicated to them came into the town of Mozafferpur. On the 19th May they presented a petition to the District Magistrate impugning the right of the ferry farmers to the ferries and praying that they (the petitioners) should not be appointed special constables. While they were in Mozafferpur awaiting the result of their petition to the District Magistrate, six of the petitioners were met by certain police officers who asked them to take their belts and other equipment. They refused. This was reported to the District Magistrate on the 25th May. On the same date the District Magistrate recorded an order summarily rejecting the petition which the petitioners had made

to him on the 19th. On the 26th he directed the prosecution of the six petitioners above referred to under section 19 of the Police Act for refusing to serve as special constables. It does not appear whether the District Magistrate's order rejecting their petition of the 19th was communicated to the petitioners. On the 28th May they were all present in the precincts of the court-house at Mozafferpur in connection with the section 107 proceedings in which they were accused and which were that day under trial. The remainder of the petitioners were then offered appointment, certificates and belts. They refused to take them, and upon a peon being sent to call them before the Joint Magistrate, they refused to comply. An order was then issued directing the prosecution of the remainder of the petitioners.

The only legitimate object of appointing special constables is to strengthen the ordinary police force by the addition of suitable persons. It has been more than once held by this Court that when such appointments are not made with the object above stated, proceedings under section 19 of the Police Act will not be permitted.

It does not appear that any instructions for the performance of any kind of police duty were even issued to the petitioners, and the circumstances above set forth compel us to come to the conclusion that it was never really intended to employ the petitioners as police officers.

We may note also that the proceedings under section 107 are now approaching termination. The matters in issue will be decided, and any further action to prevent a breach of the peace will, we hope, then be unnecessary.

In the circumstances, we direct that the proceeding against the petitioners be quashed.

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The Code of Criminal Procedure, as it stands at present, does not provide any obvious remedy for the prevention of disturbances during the pendency of proceedings under section 107. It was the difficulty, no doubt, which led the District Magistrate to have recourse to appointing the persons reported likely to create disturbance, special constables. We cannot, however, believe that he intended to actually utilize their services on police duties, for this would have been objectionable and would have handicapped them in their defence in the section 107 case. We may point out that in the present instance an order under section 144 would probably have sufficed. We think also that the petitioners might well have been given a hearing. Ferry farmers are often exacting.

We welcome the assurance of the Deputy Legal Remembrancer that, if we expressed the opinion that the prosecutions were ill-advised, they would be dropped.

E. H. M.

Rule absolute.

ORIGINAL CIVIL.*Before Chandhuri J.*

NATIONAL BANK OF INDIA, LTD.

v.

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Aug. 2.

A. K. GHUZNAVI.*

*Practice—Execution of decree—Civil Procedure Code (Act V of 1908)*** O. XXI, r. 41—Judgment-debtor, examination of—Application by judgment-debtor to have order for examination set aside*

An application under O. XXI, r. 41, of the Civil Procedure Code, 1908, made *ex parte* on a verified tabular statement, is in order.

The judgment-debtor is entitled to be heard to have such order set aside, but he should apply on summons.

The object of O. XXI, r. 41 is to obtain discovery for purposes of execution to avoid unnecessary trouble in obtaining satisfaction of money decrees.

Although an order for personal examination is likely to operate harshly and cause unnecessary harassment and obviously ought not to be made unless the Court is satisfied about the *bona fides* of the application and its urgent necessity, still such applications may be usefully encouraged to prevent unduly dilatory, troublesome and expensive execution proceedings.

In re Premji Trikundas (1) referred to

APPLICATION under O. XXI, r. 41, of the Civil Procedure Code, 1908.

In suit No. 1152 of 1914, the plaintiff Bank, on the 11th June 1915, obtained a decree for Rs. 25,454-12-9 against the defendant. On the 15th July 1915, the Bank applied for and obtained *ex parte* an order under Order XXI, rule 41, of the Civil Procedure Code for the examination of the defendant. The Bank's application was supported by a tabular statement in the form required by Order XXI, rule 11, and a separate

* Application in Original Civil Suit No. 1152 of 1914

(1) (1893) I L. R. 17 Bom. 514.

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The Code of Criminal Procedure, as it stands at present, does not provide any obvious remedy for the prevention of disturbances during the pendency of proceedings under section 107. It was the difficulty, no doubt, which led the District Magistrate to have recourse to appointing the persons reported likely to create disturbance, special constables. We cannot, however, believe that he intended to actually utilize their services on police duties, for this would have been objectionable and would have handicapped them in their defence in the section 107 case. We may point out that in the present instance an order under section 144 would probably have sufficed. We think also that the petitioners might well have been given a hearing. Ferry farmers are often exacting.

We welcome the assurance of the Deputy Legal Remembrancer that, if we expressed the opinion that the prosecutions were ill-advised, they would be dropped.

E. H. M

Rule absolute.

ORIGINAL CIVIL.

Before Chaudhuri J.

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v.

Aug. 2.

A. K. GHUZNAVI.*

Practice—Execution of decree—Civil Procedure Code (Act V of 1908)
O. XXI, r. 41—Judgment-debtor, examination of—Application by judgment-debtor to have order for examination set aside.

An application under O. XXI, r. 41, of the Civil Procedure Code, 1908, made *ex parte* on a verified tabular statement, is in order.

The judgment-debtor is entitled to be heard to have such order set aside, but he should apply on summons.

The object of O. XXI, r. 41 is to obtain discovery for purposes of execution to avoid unnecessary trouble in obtaining satisfaction of money decrees.

Although an order for personal examination is likely to operate harshly and cause unnecessary harassment and obviously ought not to be made unless the Court is satisfied about the *bona fides* of the application and its urgent necessity, still such applications may be usefully encouraged to prevent unduly dilatory, troublesome and expensive execution proceedings.

In re Premji Trikumdas (1) referred to.

APPLICATION under O. XXI, r. 41, of the Civil Procedure Code, 1908.

In suit No. 1152 of 1914, the plaintiff Bank, on the 11th June 1915, obtained a decree for Rs 25,454-12-9 against the defendant. On the 15th July 1915, the Bank applied for and obtained *ex parte* an order under Order XXI, rule 41, of the Civil Procedure Code for the examination of the defendant. The Bank's application was supported by a tabular statement in the form required by Order XXI, rule 11, and a separate

* Application in Original Civil Suit No. 1152 of 1914.

(1) (1893) I. L. R. 17 Bom. 514.

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affidavit. The order directed that the defendant should be served with a notice and attend on the 29th July 1915 for his personal examination.

Mr. B. C. Mitter appeared, on the 29th July 1915, on behalf of the defendant and urged that the order should be set aside. Mr. Mitter's arguments are fully dealt with in the judgment.

Mr. A. A. Avetoom, on behalf of the plaintiff Bank, referred to the analogous rule in the Rules of the Supreme Court, namely, Order XLII, rule 32, and contended that he was entitled to the order as of right; in support of his contention he referred to the case of *Republic of Costa Rica v. Strousberg* (1) and particularly to the judgment of James L. J.

Cur. adv. null.

CHAUDHURI J. A question has arisen in connection with this matter as to the procedure to be followed and the requisites for obtaining an order under Order XXI, rule 41, which corresponds to Order XLII, rule 32 of the English Supreme Court Rules of 1883. In England an application has to be made by summons before a Master in Chambers. If the debtor has appeared to the writ by a solicitor, the summons must be served at the address for service, and an affidavit to that effect is necessary. Although our Order XXI, rule 41 is an amplification of section 219 of Act VIII of 1859 modified by section 267 of Act X of 1877, cases under it are rare. In fact a careful search among the records of this Court has resulted in the discovery of three cases only. It appears that those applications were made on verified tabular statements in the form directed by Order XXI, rule 11, sub-clause (2) and were *ex parte*. In the case of *Premji Trikumdas* (2), the application appears to have been made *ex parte*. Our Court has

(1) (1880) 16 Ch. D. 8, 12.

(2) (1893) I. L. R. 17 Bom. 514.

framed no special rules with reference to this matter, and I must, therefore, hold that the present application, which was made *ex parte* on a verified tabular statement, is in order.

The defendant has been served with the order for his examination, and has now appeared by counsel and urges that the order should be set aside. As our procedure allows such an order to be made *ex parte*, I am of opinion that it is open to the Court to hear the objections of the person summoned, before he is actually examined. In the Bombay case above cited, the party ordered to be examined applied on summons to have the order set aside. I think that procedure should ordinarily be followed. I have, however, treated this as an application to set aside my original order, and, as the plaintiff Bank was prepared to go on with the matter on that basis, I have not required a formal written application.

Counsel for the judgment-debtor has urged that the order should be set aside, as the decree-holders have not shown what steps they have taken to enforce the decree and the result thereof; that in fact they have taken no steps at all; that the Court should not make such an order before the usual methods of execution are exhausted. He relied upon a passage in Edwards on Execution to that effect (Edn. 1888) which does not appear to be based upon any reported decision. I find no such statement in Anderson on Execution (Ed. 1889). I, therefore, look upon the passage cited as an expression of the writer's opinion. The object of the rule is to obtain discovery for purposes of execution to avoid unnecessary trouble in obtaining satisfaction of money decrees. It is a useful rule, but orders for discovery may operate harshly against the party directed to give discovery and ought not to be lightly made. An order for personal examination is

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likely to operate still more harshly and cause unnecessary harassment and obviously ought not to be made unless the Court is satisfied about the *bond fides* of the application and urgent necessity for it. It appears to me that it can be made at any stage of the execution proceedings, and keeping in view the observations I have made, such applications ought not to be discouraged. They may perhaps be usefully encouraged to prevent unduly dilatory, troublesome and expensive execution proceedings. I do not agree with the view that it should only be made when all other methods have been exhausted.

Counsel for the judgment-debtor has strongly urged that the decree-holders do not appear to have taken any trouble to find out for themselves what properties the defendant has; they have not shown that there is any difficulty in finding them out; that their allegations about his liabilities are vague; and that, upon the materials before the Court, their apprehension that the decree may prove infructuous, is baseless. I quite agree that the enquiries made by the decree-holders were perfunctory and that, without much trouble or expense, they could have got particulars. In connection with this point I must note the fact that I was not prepared to make the order on their tabular statement, which omitted to state the grounds of belief and sources of information. We do not accept such verification, and I therefore asked for fuller particulars, when an additional affidavit was filed. But even now it does not appear to me to be satisfactory. I have no reason to doubt the *bond fides* of the application, but I am not satisfied that there is any difficulty in obtaining sufficient particulars about the property belonging to the judgment-debtor, by an inspection, for instance, of the Collectorate records of Mymensingh. I think the

application has been put forward hastily—perhaps in view of the approaching long vacation. The judgment-debtor has also urged, without questioning the jurisdiction of the Court to make such an order, that the defendant lives and has his properties outside the local jurisdiction of this Court, and as the decree must eventually be transferred to a district Court for execution, the application is premature. I do not think so. In order to obtain a transfer to a district Court the decree-holders have to swear that there are properties in that district, which is, to my mind, a ground for making such an application before applying for the transfer. The defendant has through his counsel offered to give particulars of his properties to the plaintiff Bank, and the Bank has offered to treat the information as confidential, but counsel has asked me to decide his application on its merits without reference to the offer made. I have, in consideration of the facts before me, decided to withdraw the order at present. The defendant has not appeared personally, and we have not his personal affidavit. An affidavit by his agent that there is no reason to apprehend that his principal is not likely to alienate his properties, is not satisfactory. Taking all the circumstances into consideration, I make no order for the costs of this application.

This order will not affect any future application, but I hope it will not be necessary.

W. M. C.

Attorneys for the plaintiff Bank: *Sanderson & Co.*
Attorney for the defendant: *H. C. Bannerjee.*

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SETH SOBHAG MAL DHADHA.

[ON APPEAL FROM THE COURT OF THE CHIEF COMMISSIONER OF AJMER-MERWARA.]

Arbitration—Application of parties to Court for reference of suit to arbitration—Omission of guardian of minor party to sign application—Civil Procedure Code, 1908, ss. 111, 115, 121 and O. XLVII (1); Sch. II, ss. 1, 15 and 16 (1) (2)—Ground for setting aside award—Reversal by Officiating Chief Commissioner on review of order of Chief Commissioner refusing revision—Finality of decree on award.

Held, that Sch. II s. 1 of the Civil Procedure Code, 1908, which provides that where the parties to a suit have agreed that the matters in difference shall be referred to arbitration they may apply in writing to the Court for an order of reference, does not require that the writing should necessarily be signed; and where the guardian *ad litem* of a minor party was in Court and assented to the application, the omission of the guardian to sign it was immaterial.

Held, also, (allowing the appeal) that in this case there was no defect on the face of the award, nor any misconduct of the arbitrators or umpire, nor any concealment of facts by any of the parties which would bring the case within those provisions in Sch. II which might enable the Court to set it aside; and that the officiating Chief Commissioner was, therefore, not justified in interfering in review with an order made by the Chief Commissioner refusing revision.

APPEAL 103 of 1914 from a judgment (23rd May 1912) of the officiating Chief Commissioner of Ajmer-Merwara, which set aside certain arbitration proceedings, and the award therein made by the arbitrators, and remanded the respondent's suit to the Court of

*Present: VISCOUNT HALDANE, LORD PARMOOR, LORD WRENBURY, SIR JOHN EDGE AND MR. AMEER ALI.

first instance (the Extra Assistant Commissioner, and Subordinate Judge, Ajmer).

The defendants were the appellants to His Majesty in Council.

The facts are sufficiently stated in the judgment of their Lordships of the Judicial Committee, and are also shortly set out in the judgment appealed from of the officiating Chief Commissioner (MR. W. STRATTON) which was as follows:—

"The facts of this case are briefly that the plaintiffs, Seth Sobhag Mal and his son Kanwar Kalyan Mal of Ajmer, sued to recover a sum of about Rs. 88,320 on certain accounts from Thakur Umed Singh of Sawar and his son Kunwar Banspradip (minor) represented by his guardian Bhur Singh. At a certain stage in the proceedings the parties agreed to settle the dispute by arbitration and a written application for an arbitration order was made to the Court. This application was signed by all the parties except the minor Kunwar Banspradip Singh, nor was it signed by the minor's guardian.

"The Court referred the matter to the arbitration of Messrs. Mitha Lal and Jamna Shankar with the Raja Dhiraj of Shahpura as umpire. The arbitrators agreed that Rs. 5,945 should be disallowed, but could not agree about the balance of the claim, and the matter was then referred to the umpire who further reduced the claim by Rs. 65,064 and gave an award for Rs. 17,510. After hearing the plaintiffs' objections the Court, on 16th May 1911, passed a decree according to the award.

"The plaintiffs then came up to this Court in revision, the main contention being that as the application for arbitration was not signed by all the interested parties the lower Court had acted without jurisdiction. It was held by this Court (Sir Elliot Colvin) in its

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order dated the 25th November 1911 that as the *agreement* to arbitrate had been signed by all the parties the omission to sign the *application* to the Court by the minor or his guardian was unimportant. It was further held that only the minor or his guardian could raise such objections—not the plaintiffs.

"Other points were dealt with, and it was finally held that there was no illegality or irregularity in the proceedings to justify revisional interference, and the petition was rejected. It is this order of which review is now sought.

"The case has been presented to me by Mr. V. G. Bapat assisted by Mr. Gangaram on behalf of the plaintiffs. The other side have not, I regret to say, been represented and this is no doubt unfortunate in an important case of this kind. Due notice, however, was received by the defendants, and there was ample time for them to act; there seemed to be no valid reason for not proceeding, and arguments were accordingly heard for the plaintiffs *ex parte*.

"Although there are several grounds urged in the petition for review, only one ground was taken up in the argument, namely, that the learned Chief Commissioner was in error in regarding the omission to sign the application for arbitration by one of the parties as unimportant, and covered by the existence of the agreement between the parties.

"The case rests on the specific law laid down in Schedule II, paragraph 1 of the new Civil Procedure Code (corresponding with section 506 of the old Code). It is argued that according to this rule non-joinder of all the parties renders the application, and all proceedings based thereon, illegal and *ultra vires*.

"Mr. Mulla in his commentary writes that, 'if all parties interested have joined in the application, an order of reference will be made under paragraph 3

and, in order to give jurisdiction to the Court to make an order of reference . . . it is necessary that all the parties interested must apply to the Court.' These opinions are based on Privy Council and Calcutta High Court rulings in *Ghulam Khan v. Muhammad Hassan* (1), and *Jay Prokash Lall v. Sheo Golam Singh* (2).

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"Mr. Banerji in his work 'Arbitration in India' (Ed. 1908), page 73, quotes a Privy Council ruling to the effect that, even when the parties consent to waive conditions of law, this does not give jurisdiction; and Sir Peter Maxwell at page 579 of his 'Interpretation of Statutes' says that where an act required by statute is precedent to jurisdiction, compliance cannot be dispensed with. Mr. Justice Richards in *Ramjiawan Ram v. Kali Charan Singh* (3) has laid down that Courts ought to be most careful that the provisions of section 506, Civil Procedure Code, 1882, are strictly complied with.

The learned counsel further argued that the agreement itself could not be taken as equivalent to the application for reference. The Chief Commissioner might have been influenced by the affidavit that appeared on the record to the effect that the minor had been present in Court when the application was made. But this affidavit was very defective and inadmissible. It does not bear the minor's name or that of his guardian as one of those who presented it. It has no order of the Court to bring it on the record, and it has been referred to in the lower Court's judgment actually after the Court had itself passed an order (dated 6th May 1911) to the effect that extraneous evidence about the arbitration being entered on with the consent of all parties, was inadmissible.

(1) (1901) I. L. R. 29 Calc. 167; (2) (1884) I. L. R. 11 Calc. 37.

L. R. 29 I. A. 51. (3) (1907) I. L. R. 29 All. 429, 430.

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"The Judge did not in the proceedings note the fact that the minor was present when the application was presented, and failing that the affidavit is valueless in evidence: *vide* Field's Law of Evidence, page 406."

"Counsel further urged that even if the umpire's action had been with proper jurisdiction, it was in itself illegal, as he opened the case *de novo*, whereas all he had to do was to consider the points on which the arbitrator had failed to agree. Nor did he take evidence, though he called for it. He failed to realise that his position was judicial. His award had greatly prejudiced plaintiffs, and was improperly given, even if he had jurisdiction."

"I have heard Mr. Bapat's able presentation of the case with much interest, and I have read the rulings above quoted and several others. It is, as before remarked, unfortunate that the other side have not been represented, but this seems to be their own fault. Mr. Bapat's arguments appear to me to be incontrovertible, and I feel sure that my predecessor in office would not have hesitated to accept them as exceedingly strong ones. It is no doubt true that the error in the proceedings is a technical one, but the Court frequently insists on technical accuracy, and it is none the less illegal because it is technical. An error in a point of law is a good ground for review of judgment; and I am of opinion that a good case has been made out for review of this Court's order of the 25th November 1911, which was passed summarily without hearing arguments."

"I accept the application with costs, and in doing so accept the previous application for revision of the lower Court's order. The whole of the arbitration proceedings ordered in the lower Court must be regarded as without jurisdiction, and must be set aside."

"The case stands where it did before reference to arbitration was ordered by the lower Court, and must be proceeded with according to law from that point."

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On this appeal, which was heard *ex parte*,

B. Dube, for the appellants, contended that the decree of 16th May 1911 made on the award by the Trial Judge was final and no appeal lay from it: reference was made to the Civil Procedure, 1908, Schedule II, sections 15 and 16 (1) and (2). The Chief Commissioner, though under section 16 he had, it was submitted, no power to entertain an appeal from or to revise the order, rightly held that the objection taken by the respondents that the application to the Court to refer the case to arbitration had not been signed by the guardian *ad litem* was not a valid objection, because all the parties having consented to it, the application was therefore not required to be signed. He found that there was no illegality or irregularity in the proceedings such as would justify revision of the order under section 115 of the Code, and he rightly rejected the application. The officiating Chief Commissioner, it was contended, acted entirely without jurisdiction in setting aside the Commissioner's order on review on the ground that the omission to sign the application for arbitration was fatal to the validity of the proceedings: such action was not only not justified under section 114 of the Code, but was a violation of the provisions of O. XLVII (1) of Sch. I. Reference was also made to the case of *Ghulam Khan v. Muhammad Hassan* (1), decided under the Civil Procedure Code, 1882. The decision appealed from, it was submitted, should be reversed.

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The judgment of their Lordships was delivered by VISCOUNT HALDANE. In this appeal the question is whether the Officiating Chief Commissioner of Ajmer-Merwara has properly set aside the award in certain arbitration proceedings. The respondent had brought a suit to recover from the appellants Rs. 88,320 alleged to be due under a mortgage. The appellant first on the record is the father of the second appellant, who was at the time of the proceedings a minor. The Trial Judge appointed one Bhur Singh guardian *ad litem* of this minor appellant. Before the trial came on, all the parties entered into an agreement to refer the questions in dispute to two arbitrators and, in the event of these differing, to an umpire. The agreement was signed by the appellants and respondents each with his own hand, excepting in the case of the minor appellant, on whose behalf it was signed by the guardian *ad litem*. The parties appeared before the Trial Judge and produced the agreement and applied for an order of reference. The guardian *ad litem* was present in Court and was a party to the application. The Trial Judge thereupon made an order of reference. The arbitrators differed, and the parties then concurred in an application to refer the dispute to the umpire, and an order was made accordingly. The umpire made an award allowing the respondents' claim to the extent of Rs. 17,510 only. This award was filed in Court. The respondents, being dissatisfied with it, applied to the Trial Judge under the provisions of s. 15 of the Second Schedule of the Code of Civil Procedure, 1908, to set the award aside. The Trial Judge refused the application. He held that all the parties to the suit, including the guardian *ad litem*, had been consenting parties to the application, and further that there was no ground for the objections made on the merits to the award. The order was

made under s. 16 of the Second Schedule to the Code already referred to. "This section provides that—

"(1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree, except in so far as the decree is in excess of, or not in accordance with, the award."

The respondents then presented an application to the Chief Commissioner under section 115 of the Code of Civil Procedure. This section provides that :—

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court, and in which no appeal lies thereto, and if such subordinate Court appears (a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order as it thinks fit."

The Chief Commissioner dismissed the application. He held that the point taken that the application to the Court for reference to arbitration was not signed by the guardian *ad litem*, was not a good one, having regard to the fact that the agreement itself was signed by all parties concerned. Moreover, he thought that it was for the minor or his guardian, and not for the applicants, to raise such an objection. He also held that even if an agreement or compromise entered into on behalf of a minor without the leave of the Court was voidable against all parties other than the minor, that did not make it necessarily void against the minor. As to the merits he was of opinion that there was nothing in the case made for the applicants, the present respondents, based on misconduct or irregularity on the part of the arbitrators and umpire.

The respondents then applied to the Court of the Chief Commissioner for a review of this order,

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relying on s. 114 of the Code which, subject to such conditions and limitations as may be prescribed, allows a person aggrieved to apply for a review of any decree or order from which no appeal is allowed by the Code, and relying also on Order XLVII (1) of the First Schedule to this Code which provides that he may apply for such review on :—

“The discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.”

These rules are, under s. 121 of the Code, to have effect as if enacted in it, until altered as the Code provides.

This application for review was heard, not by Sir Elliot Colvin, the Chief Commissioner, but by Mr. Stratton who was officiating in his absence. The appellants were not represented on this hearing. The main point urged was that in dismissing the application for review, the Chief Commissioner was in error in regarding the omission to sign the application for arbitration by the minor or his guardian as unimportant, and as covered by the agreement which all the parties had signed. The Officiating Chief Commissioner acceded to the application, and set aside the whole of the arbitration proceedings, on the ground, apparently, that this error in the proceedings, though technical only, was fatal. The only other arguments before him appear to have been that even if the umpire had proper jurisdiction his action was illegal, because he opened the case *de novo*, whereas all he had to do was to consider the points on which the arbitrators had failed to agree, and because he had not taken evidence, although he called for it.

Their Lordships have had to hear the appeal *ex parte*, as the respondents, the plaintiffs in the suit,

did not appear on the appeal, but they have examined closely the documents and the various judgments in the Courts below. They are of opinion that the decisions of the Trial Judge and of the Chief Commissioner were right, and ought not to have been interfered with by the Acting Chief Commissioner.

In the first place the Second Schedule to the Code of Civil Procedure, which provides by s. 1 that where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an Order of Reference, does not require that the writing should of necessity be signed. As the guardian in this case was in Court and assented to the application it is plain that no injustice has arisen. They think, therefore, that there is no substance in the technical objection relied on. Nor can they find any defect on the face of the award, or any misconduct of the arbitrators or umpire, or concealment of facts by any of the parties which would bring the case within those provisions in the Second Schedule which might enable the Court to set it aside. They have accordingly arrived at the conclusion that the Acting Chief Commissioner was not justified in interfering with the order refusing revision made by the Chief Commissioner.

They are, therefore, of opinion that the appeal must be allowed with costs here and in the Courts below, and they will humbly advise His Majesty to that effect.

Appeal allowed.

Solicitors for the appellants: *Barrow, Rogers & Nevill.*

J. V. W.

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CIVIL RULE.

Before Holmewood and Mullick JJ.

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Nor. 25. *Interrogatories—Method of administration—Disclosure of assets by affidavit in probate proceedings, how obtained—Civil Procedure Code (Act V of 1908) O. XI, r. 2.—Probate and Administration Act (V of 1881) s. 55.*

Order XI of the present Code of Civil Procedure applies to proceedings in probate (*vide* section 55 of the Probate and Administration Act).

Under that Order there are only two methods of discovery, one by interrogatories and the other by an order directing discovery of documents in the possession or power of the other side.

An affidavit of assets actually received can, therefore, be obtained in probate proceedings by interrogatories only.

Under rule 2 of Order XI, in India as in England, the Judge has not any power to settle interrogatories, but he can only decide what should be administered.

The *dicta* in English cases with regard to the more extensive powers of Courts in matters of probate, seem to imply that the strictest relevancy may not be required in interrogatories therein.

RULE obtained by Anilabala Dasi, the caveatrix.

On the 3rd August 1914, the opposite party applied to the District Judge, 24-Parganas, for probate of an unregistered will, dated 19th July 1914, alleged to have been executed by their youngest brother Upendra Nath Dalal who died on the 20th July 1914 at the premature age of 26, leaving a widow Anilabala Dasi, the present caveatrix. The citation issued by Court upon the widow was alleged to have been

*Civil Rule No. 932 of 1915, against the Order of A. H. Cuming, District Judge of 24-Parganas, dated Aug. 6, 1915.

suppressed; on the 3rd September 1914 the Court made an order for probate of the aforesaid will in common form, and it was actually issued on the 17th September 1914. The widow came to know of this probate for the first time when it was shown to her father on 4th April 1915. Thereupon she applied, on 1st May 1915, to the District Judge of 24-Parganas, for revocation of the said grant under section 50 of the Probate and Administration Act and obtained an order directing the proponents to prove the said will in solemn form. She then entered a caveat on 2nd June 1915 and put in objections on 21st July 1915, two of them being as follows:—

"(a) That this defendant submits that the value of the estate left by her deceased husband has been intentionally under-valued. The actual value thereof is not less than one lac of rupees and the monthly income therefrom is at least Rs. 500. The petitioners for probate have intentionally omitted to give all necessary details of the properties (comprised in the said estate) in the affidavit annexed to the said petition for probate."

"(b) That this defendant has been advised and submits that all the necessary particulars required by law not having been set forth in the said affidavit and the same not having been sworn to by the said petitioners or either of them, the said petition for probate cannot be entertained." The said caveatrix further put in an application before the District Judge on 4th August 1915 praying that the proponents, opposite parties, be compelled "to disclose fully and correctly the properties left by the deceased and the valuation thereof by affidavit or affidavits to be made by them personally." The Court rejected this application. She thereupon moved the High Court for a rule alleging that she had been informed by her husband

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shortly before his death that he was possessed of properties worth more than a lac of rupees, and that the annual income from the said properties was not less than Rs. 6,000.

Dr. Dwarkanath Mitra and *Babu Satish Chandra Ghatak*, for the petitioner. The petitioner is the widow of the testator. The opposite party at first obtained probate in common form and when I objected, it was proved in solemn form. They say the estate is worth only Rs. 47,000; but I say that the testator left one lac. We wanted the Court below to call upon them to personally swear an affidavit regarding the assets. *Vide* section 55 of the Probate and Administration Act and rule 11 of Order XI regarding discovery of documents and evidence. I now want a discovery by way of answer to interrogatories.

[HOLMWOOD J. Did you file any interrogatories with your petition, as required in India, at the time of applying? This is not so in England where it is done in Chambers.]

On 4th August we filed a petition for discovery asking that the proponents be compelled to swear an affidavit.

[HOLMWOOD J. The rule is mandatory and the interrogatories must be filed. What you did must be under some other rule.]

We asked in other words for discovery under that rule.

[*Babu Jogendra Nath Mukherjee*, for the opposite party. The inventory has already been filed.]

What is there to prevent the inventory from being filed now, if the procedure has in substance been followed?

[HOLMWOOD J. No, it has not. Nothing has been disclosed to frame an issue. When you are seeking

to put a man in jeopardy of perjury you must do everything explicitly. Rule 2 is mandatory. It is a very particular rule and we cannot allow any infringement of it. You can go and do so now before the Judge. See *Peek v. Ray* (1).]

Reads petitioner's affidavit in the High Court.

[HOLMWOOD J. No wonder the District Judge says that there is no provision in the Code of Civil Procedure under which what you ask can be ordered. It has been held that the Judge has no power to settle interrogatories, which must be put in verbatim before the Judge, to see if they are scandalous or improper or irrelevant.]

Reads the English Rules of 1915. The Probate Court in England has wider discretion regarding interrogatories.

The opposite party was not called upon to reply.

HOLMWOOD AND MULLICK JJ. This was a Rule (obtained by the caveatrix) calling upon the opposite party to show cause why the order of the Court referred to in the petition should not be set aside and the opposite party directed to make a full discovery of the assets of the deceased by an affidavit sworn by them personally in the form required by law.

It appears, that a petition was filed before the learned Judge averring that the inventory filed by the other side as executors to her husband's estate which alleged that only fortyseven thousand rupees came into their hands in cash was erroneous, and that as a matter of fact they obtained a lakh of rupees or more and they asked the District Judge to direct the opposite party to make a full discovery of the assets of the deceased by an affidavit sworn by the opposite party personally. The learned Judge refused the

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application on the ground that there appeared to him to be nothing in the probate Act which would enable him to make any such discovery. He apparently did not have it brought to his notice that section 53 of the Probate and Administration Act lays down that "proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, except as hereinafter otherwise provided, be regulated so far as the circumstances of the case will admit by the Code of Civil Procedure." There is, therefore, no doubt that Order XI of the present Code of Civil Procedure applies to proceedings in probate. Under that order there are only two methods of discovery, one by interrogatories and the other by an order directing discovery of documents in the possession or power of the other side. The affidavit which the petitioner desires to obtain can therefore only be obtained by the first method, namely, by interrogatories; and it is laid down clearly in Order XI, rule 2, that on application for leave to deliver interrogatories the particular interrogatory proposed to be delivered shall be submitted to the Court; and in the case before us no interrogatories whatever were submitted to the Court; and it has been held in England, and the same rule applies in this country, that under this rule the Judge has not any power to settle interrogatories, but he can only decide what should be administered. Until the interrogatories are filed, it is impossible for him to settle whether there is anything offensive, improper or irrelevant in those interrogatories; and the *dicta* that have been laid before us from English cases with regard to the more extensive powers of Courts in matters of probate, seem to us to imply that possibly in such matters the Judge would not be astute to insist upon the strictest relevancy, but he certainly would be

obliged to exclude anything offensive or improper in the same way as in any other case. It may be that in matters of probate the strictest relevancy in the interrogatories may not be required, but this is a matter for the Judge to decide when the interrogatories are filed before him. Until the interrogatories are filed he is absolutely without any power whatever in the matter.

We are, therefore, unable to help the petitioner upon the present Rule. As there is no provision of limitation applying to such proceedings, we can see no reason why he should not file a proper petition with proper interrogatories as laid down in Order XI of the Code of Civil Procedure, and we have no doubt that, if he does so, the Judge will give them proper attention in the exercise of his judicial discretion, and administer such as may be according to law.

With these remarks the Rule is discharged. The opposite party is entitled to his costs of this hearing.

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Rule discharged.

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Before Sanderson C. J., Woodroffe and Moukerjee JJ

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Sale of Goods—Contract for forward monthly deliveries—Construction—Anticipatory breach—Measure of damages.

In a contract, dated June 4th, for the purchase of 300 tons of Java sugar, it was stipulated "shipments to be made by steamers during July to December 1914 , the agreement to be construed as a separate contract in respect of each shipment." Without giving any delivery, on the

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application on the ground that there appeared to him to be nothing in the probate Act which would enable him to make any such discovery. He apparently did not have it brought to his notice that section 53 of the Probate and Administration Act lays down that "proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, except as hereinafter otherwise provided, be regulated so far as the circumstances of the case will admit by the Code of Civil Procedure." There is, therefore, no doubt that Order XI of the present Code of Civil Procedure applies to proceedings in probate. Under that order there are only two methods of discovery, one by interrogatories and the other by an order directing discovery of documents in the possession or power of the other side. The affidavit which the petitioner desires to obtain can therefore only be obtained by the first method, namely, by interrogatories; and it is laid down clearly in Order XI, rule 2, that on application for leave to deliver interrogatories the particular interrogatory proposed to be delivered shall be submitted to the Court; and in the case before us no interrogatories whatever were submitted to the Court; and it has been held in England, and the same rule applies in this country, that under this rule the Judge has not any power to settle interrogatories, but he can only decide what should be administered. Until the interrogatories are filed, it is impossible for him to settle whether there is anything offensive, improper or irrelevant in those interrogatories; and the *dicta* that have been laid before us from English cases with regard to the more extensive powers of Courts in matters of probate, seem to us to imply that possibly in such matters the Judge would not be astute to insist upon the strictest relevancy, but he certainly would be

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With these remarks the Rule is discharged. The opposite party is entitled to his costs of this hearing.

G. S.

Rule discharged.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J., Woodroffe and Mookerjee JJ.

BILASIRAM THAKURDAS

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Sale of Goods—Contract for forward monthly deliveries—Construction—Anticipatory breach—Measure of damages.

In a contract, dated June 4th, for the purchase of 300 tons of Java sugar, it was stipulated "shipments to be made by steamers during July to December 1914 the agreement to be construed as a separate contract in respect of each shipment." Without giving any delivery, on the

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18th August the seller repudiated the contract. In an action for breach of contract brought by the buyer on the 26th August claiming damages in respect of the whole contract for 300 tons :—

Held, that on the true construction of the contract, the buyer had the right to demand delivery of the goods by separate shipments spread over the months from July to December, and the true measure of damages was the aggregate of the differences between the contract price and the market price at the appointed times of delivery in each month.

Roper v. Johnson (1), *Wertheim v. Chicontimi Pulp Co.* (2), *Frost v. Knight* (3) and *Brown v. Muller* (4) referred to.

Per Mookerjee J. In the circumstances of the case, the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of the goods.

Calamnius v. Dowlais Iron Co. (5), *Coddington v. Paleologo* (6) referred to.

Thornton v. Simpson (7), *Tarling v. O'Riordan* (8), *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (9) cited by Mookerjee J.

It being found that the principle applied by the Court of first instance in assessing damages was erroneous, but that on the application of the proper principle the damages to be allowed would be larger, on the defendant's appeal the Court declined to disturb the judgment or order a remand.

APPEAL by the defendant firm of Bilasiram Thakurdas from the judgment of Chaudhuri J.

This was an appeal in a suit brought by the buyers for damages for breach of contract on the ground of non-delivery.

By a contract evidenced by bought and sold notes dated the 4th June 1914 the plaintiff Ezekiel Abraham Gubbay purchased from the defendant firm 300 tons of Brown Java sugar of a certain description at Rs. 6-0-6 per bazar maund to be delivered duty paid *ex* Kidderpore Docks, jetty or ghat. Shipments to be made by steamers during July December 1914—shipment in any month by one or more steamers.

(1) (1873) L. R. 8 C. P. 167.

(2) [1911] A. C. 391.

(3) (1872) L. R. 7 Ex. 111

(4) (1872) L. R. 7 Ex. 319

(5) (1878) 17 L. J. Q. B. 575.

(6) (1867) L. R. 2 Ex. 193.

(7) (1816) 6 Taunt. 556.

(8) (1878) 2 L. R. 1c. 82.

(9) (1856) L. R. 12 A. C. 128.

It was provided that seven days' margin should be allowed for shipment. The 12th and 16th clauses of the contract were :—

" 12 This agreement to be deemed and to be construed as a separate contract in respect of each shipment of goods shipped in pursuance thereof or intended by sellers for, or available for the fulfilment of this contract and the rights and liabilities of sellers and buyers respectively to be the same as they would have been had a separate contract been signed in respect of each such shipment.

16. In the event of buyers failing to take delivery in accordance with the terms and provisions hereof any shipment or part of any shipment hereunder and upon each occasion on which such failure shall occur, sellers will be at liberty to rescind or determine this contract or any part hereof by notice in writing given within fourteen days from the date for delivery of such shipment or part of a shipment."

On the 4th August, war was declared between England and Germany.

On the 10th August a letter was written by the defendants to the plaintiff in these terms: " We beg to intimate to you that owing to the war, no sugar can be shipped from Java without war insurance being effected on payment of extra war rates. We shall thank you to intimate to us if you are prepared to take the sugar on payment of the extra war insurance rates charged therefor. Unless we hear from you within 24 hours agreeing to pay the extra war insurance rates we shall take it that you have cancelled the July to December portions of the above contract which has been ready for despatch from Java." The plaintiff replied on the 12th August " I write to inform you that I am bound by the contract under which I have purchased and you have sold me

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the sugar and that I am prepared to carry out all and only such obligations as are included in the terms of the contract." On the 13th August the defendants wrote as follows: "Unless you give us a definite reply as to whether you accept the condition within two days we shall consider the contract as cancelled." On the 14th August the plaintiff replied: "My letter to you of the 12th instant was quite definite and I am only bound by the conditions of the contract under which I purchased and you sold me the sugar. You have absolutely no right to consider my contract with you cancelled in any way, and if you do so, you will do it on your own risk and responsibility. Please note I hold you strictly to the terms of the contract and if you fail to fulfil it in any way I shall take such proceedings against you as I may be advised to take."

On the 18th August the plaintiff wrote complaining that he had not received notice of arrival of his July shipment of sugar purchased from the defendants. On the same date the defendants replied: "With reference to your letter of the 14th and 18th instant we regret we cannot add anything now to what we wrote to you on the 13th instant. Please note that we have already cancelled your contract. Further correspondence with regard to the said contract will be useless."

On the 26th August the present suit was instituted for damages for breach of contract. Damages were claimed on the following bases: in respect of 50 tons, alleged to be the July shipment on the basis of the difference between the contract rate and market rate for ready goods on the 19th August, namely, Rs. 7-6 for bazar maund; in respect of 50 tons alleged to be August shipment, on the difference between the contract price and the price actually paid for goods purchased on the 20th August against the contract,

namely, at the rate of Rs. 8 per bazar maund, in respect of the balance of 200 tons, on the difference between the contract rate and the market rate on the 20th August for forward shipment for September to December 1914, namely, Rs. 8 per bazar maund. The damages claimed aggregated Rs. 15,259-12.

In their written statement the defendants took the defences that the contract was by way of wager and that they were entitled to cancel the contract owing to the plaintiff's refusal to pay extra freight and insurance demanded in consequence of the outbreak of the war. The defendants further denied the correctness of the market rates alleged by the plaintiff or that the plaintiff had suffered any loss or damage.

The suit came on for hearing before Chandhuri J.

It appeared from the evidence that the voyage from Java took from eleven to thirteen days, and that the market for sugar was a rising one from August onwards, the price increasing to about Rs. 10 per bazar maund.

On the 19th March 1915, the learned Judge decided the suit, observing as follows :—

"The plaintiff purchased 300 tons of Brown Java Sugar from the defendant firm shipments July to December, 50 tons each month. The contract provided an extra seven days for each month's shipment, that is to say, the July shipment could have been made in the first week of August and so on. There is evidence that the voyage from Java to Calcutta direct takes 11 days therefore the first shipment was due to arrive about the 17th or 18th of August 1914. In the meantime war had been declared and the defendant firm wrote to the plaintiff asking him if he was prepared to pay extra war insurance rate and in the event of his not agreeing whether he would cancel the contract. The plaintiff replied that he would abide by the terms of his contract. Then on the 18th August came a letter from the defendant saying that he had already cancelled the contract, although there had been no previous cancellation by him. It is quite clear that the defendant's letter of the 18th must be taken as his repudiation. This letter was received by Gubray, the plaintiff, on the 18th August between 6 and 7 p.m. when it was too late for him to take any steps that day. The next day

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he went to the market and tried to purchase ready goods at spot price. The rate for the same quality was Rs. 7-6-6 rising to Rs. 7-8. He tried that day and the next to buy forward shipments August to December, and managed to get one lot of 50 tons at Rs. 8 for the August shipment. The evidence is quite clear that at that time there were a large number of buyers and very few sellers. I accept the evidence which has been given by the plaintiff with regard to what he did and the rates he was offered. It is supported by the evidence of Mr. Manessell who is in the Sugar Department of a very large firm in Calcutta. He has produced his books, and his evidence entirely supports the claim made by the plaintiff. There was another witness of the name of Chiman Ram on behalf of the plaintiff. He was examined and partially cross-examined. He was asked to produce certain books and his examination stood over in consequence. As he failed to appear by the time the rest of the evidence was finished, the plaintiff's counsel asked that his evidence should be rejected altogether. The defendant also did not desire that the case should stand over for further cross-examination. So I am treating that evidence as not given. The defence has been three-fold: (i) The contract was of a wagering nature. That defence was abandoned. (ii) That under the terms of the contract the defendant was entitled to claim extra war insurance from the plaintiff, and he not having agreed to pay it, the defendant was entitled to cancel the contract. There is no support for this from the contract. I do not think the plaintiff could have been justly called upon the extra rate. (iii) That having regard to the state of the market, it was the duty of the plaintiff to try and minimise the loss as much as possible. I do not think the plaintiff could have done more than what he did. The market had gone up. Sellers were anxious to settle, and a large number of settlement contracts were entered into in the market. There were very few forward sellers, but there were a large number of buyers. I think the plaintiff is entitled to damages on the basis claimed in the plaint, namely for the July shipment the "spot price" for goods for the August shipment at Rs. 8 and also for September to December at the same rate.

"With regard to the evidence on behalf of the defendant most of the contracts were settlement contracts. Messrs. Ralli Brothers' hanian, who was examined, said that Ralli Brothers were not sellers at the rate mentioned by him. He could not say whether they were sellers at Rs. 8 or not. He said he did not know. This I find difficult to accept. There was another witness named Manna Lal who purported to give evidence of an actual sale. It is difficult to say from his evidence as to what the nature of that transaction was. It seems to me to have been in the nature of a settlement, in which the defendant was concerned. The plaintiff had not sufficient opportunity to investigate the particulars of that

transaction. I do not think the rates for settlement contracts in the then condition of the market can be treated as the bazar rate. People settled on the best terms they could. The rate for actual sales ought to be accepted: there is no dispute practically about the ready rate. The plaintiff tried to purchase against the other shipments from different sellers, all well known in the Calcutta market, and failed to get more favourable rates. I prefer the evidence given on his behalf and decree the suit with costs on Scale No II including reserved costs."

From this judgment the defendants appealed.

Sir S. P. Sinha (with him *Mr. N. N. Gupta*), for the appellant. The Court of first instance was in error in treating the contract as other than one entire contract for 300 tons: it is nowhere stated in the contract that delivery was to be made by monthly instalments. The sellers were entitled to give delivery by monthly shipments, or at their option could ship the whole quantity by one shipment between the months of July and December: *Brandt v. Lawrence*(1). Now by his letter of the 13th August the defendant clearly indicated his intention of cancelling the contract on the 15th August and the plaintiff treated the letter as a repudiation of the whole contract. Consequently the 15th August must be taken as the date of breach of the whole contract. Damages should be assessed in respect of the whole quantity of 300 tons on the basis of the market rate on the 15th August, the date of breach: *Calaminus v. Dovlaïs Iron Co.*(2).

In a rising market, the plaintiff should not be allowed to split up the whole quantity into several lots of 50 tons. The plaintiff was bound to minimize his damages. [Further argument was addressed on the evidence as to market rates.]

Mr. B. C. Mitter (following, with permission of the Court). The purchaser had to elect whether he would accept the sellers' repudiation of the contract, or

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he went to the market and tried to purchase ready goods at spot price. The rate for the same quality was Rs. 7-6-6 rising to Rs. 7-8. He tried that day and the next to buy forward shipments August to December, and managed to get one lot of 50 tons at Rs. 8 for the August shipment. The evidence is quite clear that at that time there were a large number of buyers and very few sellers. I accept the evidence which has been given by the plaintiff with regard to what he did and the rates he was offered. It is supported by the evidence of Mr. Manesekhi who is in the Sugar Department of a very large firm in Calcutta. He has produced his books, and his evidence entirely supports the claim made by the plaintiff. There was another witness of the name of Chiman Ram on behalf of the plaintiff. He was examined and partially cross-examined. He was asked to produce certain books and his examination stood over in consequence. As he failed to appear by the time the rest of the evidence was finished, the plaintiff's counsel asked that his evidence should be rejected altogether. The defendant also did not desire that the case should stand over for further cross-examination. So I am treating that evidence as not given. The defence has been three-fold : (i) The contract was of a wagering nature. That defence was abandoned. (ii) That under the terms of the contract the defendant was entitled to claim extra war insurance from the plaintiff, and he not having agreed to pay it, the defendant was entitled to cancel the contract. There is no support for this from the contract. I do not think the plaintiff could have been justly called upon the extra rate. (iii) That having regard to the state of the market, it was the duty of the plaintiff to try and minimise the loss as much as possible. I do not think the plaintiff could have done more than what he did. The market had gone up. Sellers were anxious to settle, and a large number of settlement contracts were entered into in the market. There were very few forward sellers, but there were a large number of buyers. I think the plaintiff is entitled to damages on the basis claimed in the plaint, namely for the July shipment the "spot price" for goods for the August shipment at Rs. 8 and also for September to December at the same rate.

"With regard to the evidence on behalf of the defendant most of the contracts were settlement contracts. Messrs. Ralli Brothers' witness, who was examined, said that Ralli Brothers were not sellers at the rate mentioned by him. He could not say whether they were sellers at Rs. 8 or not. He said he did not know. This I find difficult to accept. There was another witness named Manna Lal who purported to give evidence of an actual sale. It is difficult to say from his evidence as to what the nature of that transaction was. It seems to me to have been in the nature of a settlement, in which the defendant was concerned. The plaintiff had not sufficient opportunity to investigate the particulars of that

transaction. I do not think the rates for settlement contracts in the then condition of the market can be treated as the bazar rate. People settled on the best terms they could. The rate for actual sales ought to be accepted : there is no dispute practically about the ready rate. The plaintiff tried to purchase against the other shipments from different sellers, all well known in the Calcutta market, and failed to get more favourable rates. I prefer the evidence given on his behalf and decree the suit with costs on Scale No II including reserved costs."

From this judgment the defendants appealed.

Sir S. P. Sinha (with him *Mr. N. N. Gupta*), for the appellant. The Court of first instance was in error in treating the contract as other than one entire contract for 300 tons: it is nowhere stated in the contract that delivery was to be made by monthly instalments. The sellers were entitled to give delivery by monthly shipments, or at their option could ship the whole quantity by one shipment between the months of July and December: *Brandt v. Lawrence* (1). Now by his letter of the 13th August the defendant clearly indicated his intention of cancelling the contract on the 15th August and the plaintiff treated the letter as a repudiation of the whole contract. Consequently the 15th August must be taken as the date of breach of the whole contract. Damages should be assessed in respect of the whole quantity of 300 tons on the basis of the market rate on the 15th August, the date of breach: *Calaminus v. Do clais Iron Co.* (2).

In a rising market, the plaintiff should not be allowed to split up the whole quantity into several lots of 50 tons. The plaintiff was bound to minimize his damages. [Further argument was addressed on the evidence as to market rates.]

Mr. B. C. Miller (following, with permission of the Court). The purchaser had to elect whether he would accept the sellers' repudiation of the contract, or

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(1) (1876) L. R. 1 Q. B. D. 344. (2) (1878) 47 L. J. Q. B. 575.

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consider it as still open. If he elected to treat the contract as broken, the breach must be deemed to be as on the day when repudiation was first intimated i.e. the 15th August : *Johnstone v. Milling* (1).

Mr. Zorab (with him *Mr. Hyam*), for the respondent, was not called upon on the question of the construction of the contract as regards delivery by instalments. On the question of damages—the defendant's letter of the 13th August was not a clear repudiation of the contract. The first clear intimation of repudiation was contained in the letter of the 18th August, which was received after working hours. It follows that the breach occurred on the 19th August. The measure of damages is independent of the date of the breach; the true measure is the difference between the contract rate and the market rate on the last days when the several deliveries in respect of the several instalments should have been given : *Brown v. Muller* (2), *Frost v. Knight* (3). On this basis the plaintiff was entitled as damages to a larger sum than he had claimed, or than had been decreed in his favour. The damages in respect of the July shipment have been correctly assessed on the basis of the difference between the contract rate and the market rate on the 19th August—the last day for delivery of that shipment. As to the August shipment, the damages have been assessed on the basis of the difference between the contract price and the price actually paid for similar goods on the 20th August. With regard to the remaining four shipments aggregating 200 tons the plaintiff has minimized the damage by assessing it on the basis of the difference between the contract rate and the market rate on the 20th August

(1) (1886) L. R. 16 Q. B. D. 460, 467. (2) (1872) L. R. 7 Ex. 319.

(3) (1872) L. R. 7 Ex. 111.

for similar sugar for shipment September to December.

As to the correctness of the market rates, this was a question of fact which was decided on the evidence in the plaintiff's favour by the Court of first instance, and there is no reason to go behind that finding.

Mr. B. C. Mitter, in reply. Where the question before the Court is one of inference only, the Court of first instance is in no better position than the Court of appeal: *Montgomery & Co. Ltd. v. Wallace-James* (1).

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SANDERSON C. J. In this case the plaintiff brought his action against the defendants claiming damages for breach of contract. The contract was in respect of 300 tons of Brown Java sugar, which were to be delivered in Calcutta, and the contract price was rupees six and pies six per Bazar matund; the goods were to be delivered ex Kidderpore Docks Jetty or Ghat, and the shipments were to be made by steamers during July to December 1914. The date of the contract was the 4th of June 1914 and the first shipment would have to be made in July. But in the contract there was a clause giving the shipper seven days' margin, so that if he shipped the July shipment by the 7th of August, it would be in accordance with the terms of the contract. It was given in evidence in the course of the case that the length of the voyage would be eleven days but it was said on behalf of the plaintiff that it would be thirteen days, and for the sake of this case we may take it from eleven to thirteen days, so that the first shipment under this contract namely the July shipment, if the shipper took the whole margin which was allowed to him, that is, the

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first seven days of August, would be due to be delivered in Calcutta about the 18th or 19th of August.

Now, on the 4th of August, as every body knows war was declared, and, a letter was written a few days afterwards by the defendants in these terms, "We beg to intimate to you that owing to the war no sugar can be shipped from Java without war insurance being effected on payment of extra war rates. We shall thank you to intimate to us if you are prepared to take the sugar on payment of the extra war insurance rates charged therefor. Unless we hear from you within 24 hours agreeing to pay the extra war insurance rates, we shall take it that you have cancelled the July to December portions of the above contract which has been ready for despatch from Java." The answer to that from the plaintiff was, "I write to inform you that I am bound by the contract under which I have purchased and you have sold me the sugar and that I am prepared to carry out all and only such obligations as are included in the terms of the contract." On the 13th the defendants wrote "unless you give us a definite reply to whether you accept the condition within two days, we shall consider the contract as cancelled." On the 14th the plaintiff replied practically confirming what he had already said that he stood by his contract. On the 18th he wrote complaining 'that he had not yet received notice of arrival of his July shipment of sugar purchased from the defendants under contract No. 503.' On the 18th of August, the defendants wrote as follows, "With reference to your letter of the 14th and 18th instant, we regret we cannot add anything now to what we wrote to you on the 13th instant. Please note that we have already cancelled your contract. Further correspondence with regard to the said contract will be useless."

Now upon that, the first point that was raised by the

learned counsel for the defendants was that that was a repudiation of the contract and that the repudiation took effect on the 15th of August, basing their argument upon the letter of the 13th of August in which they said "Unless you give us a definite reply to whether you accept the condition within two days we shall consider the contract as cancelled." It has been argued on the part of the plaintiff that that was not a definite repudiation and that it gave time for further consideration, further correspondence and further negotiations, and if the defendants had chosen to go back upon what they said in the letter of the 13th of August they could have done so. I think the plaintiff is right upon that point, and that the letter of the 13th August was not a sufficiently definite statement of repudiation, and as a matter of fact the actually definite repudiation was not made until the 18th of August, 1911. That letter of the 18th was delivered between 6 and 7 P.M. of the 18th, and I do not think it can be seriously disputed that it was too late for the plaintiff to do anything on that day. Therefore, the matter stands in this way, that on the 18th of August the defendants repudiated their contract and definitely told the plaintiff that they were not prepared to carry it out any further. Therefore, there was a breach of the contract on the part of the defendants, and the question arises to what damages the plaintiff was entitled.

Now, such a question as this in my experience nearly always gives rise to matters which are very difficult to decide, and I do not think that this is an exception in that respect; it does raise difficulty as to the proper measure of damages.

The first point on this part of the case, which was raised by the leading counsel for the defendants, is

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this: he argued that although the defendants the sellers were entitled to deliver the 300 tons of brown Java sugar by instalments by shipment in each month, from July down to December, the buyer had not the right to demand delivery by such shipments or instalments but that the sellers if they had chosen could have delivered the whole of the consignment—the whole of the 300 tons in August; or, on the other hand, he could have postponed delivery of the whole 300 tons until the last month specified in the contract. In my judgment that is not a correct construction to be put upon this contract—it is not in accordance with the terms of the contract, nor is it in accordance with the common sense of the matter. I am of opinion that just as the seller had the right to deliver by separate shipments spread over the months from July to December, the buyer in the same way had the right to demand delivery of the goods during those months from July to December. It would be an astonishing proposition from a business point of view that the seller could have delivered by instalments in the way he claimed he had the right to do, yet the buyer was bound to take the whole lot at the beginning of the period or at the end of the period. For these reasons, I do not think that the first point raised by the learned counsel was a good point.

The next point that was raised by the learned counsel for the appellant was in respect of the July shipment. The learned Judge who tried the case, in assessing the damages has taken the market price for the July shipment to be Rs. 7-6, and he has deducted from that the contract price, Rs. 6-0-6 pies, and has awarded damages upon that basis. It was argued by the learned counsel for the appellant that the learned Judge should have taken a lower

rate than Rs. 7-6 annas as the market price. I think there was sufficient evidence to justify the finding of the learned Judge that Rs. 7-6 was the market price in respect of the July shipment, and I do not think there is sufficient reason for disturbing the learned Judge's judgment upon that point.

The next point that was raised by Sir Satyendra is that in assessing the damages, not only ought the July shipment to be taken at the ready rate, but the August shipment also ought to be taken at the ready rate. As I understood him, his ground was that inasmuch as the shipper, if he had liked could have delivered the August shipment by the 19th of August, therefore the market-rate for the ready goods—(I am not sure whether that is the correct way of specifying the matter; what I mean is the market-rate for the goods which could be delivered then) ought to be taken in respect of the August shipment. I do not think that that is a sound contention for the reason that the shipper was not bound to deliver the August shipment until September, and that until September arrived there would have been no breach of contract (apart from the repudiation) on the part of the seller if he had not delivered the August shipment. I, therefore, do not think it is correct to say that the learned Judge in assessing the damages for the August shipment was bound to take the ready rate.

But then comes the matter which I think is really difficult in this case: that is with regard to the shipments other than the July shipment. The learned Judge has taken the market price as Rs. 8, and he has deducted from that the contract price, Rs. 6-6 pies. Now, with the greatest deference to the learned Judge who tried this case, I cannot bring myself entirely to agree with that part of his judgment which

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deals with the evidence which was given on behalf of the defendants. The evidence which was given on behalf of the defendants consisted of the evidence of the representative of Messrs. Ralli Brothers, and another gentleman whose name was Mouna Lal. I am leaving out the evidence of another witness because both the learned counsel for the appellant have laid no stress upon his evidence. Now, to my mind, there was evidence given which requires very careful consideration. There was first of all the evidence of the representative of Messrs. Ralli Brothers who produced his market-rate book which was made up in the ordinary course, every day at 5 o'clock in the afternoon, and, presumably, a gentleman, who represents such a well-known firm as Messrs. Ralli Brothers, goes to the market, and makes up his book at the end of each day, is in a position to know what the market-rates were, and the entries are made from day to day in the ordinary course. Speaking for myself I think that is most cogent evidence: and further, when I compare the entries in that book, as far as I can, with the entries which were made in the market book of Messrs. Sassoon & Co., namely with regard to the 15th, 17th and 18th August, I find that the rates which were entered in Messrs. Sassoon & Co.'s book agree practically with the rates entered in Messrs. Ralli Brothers' book, thereby showing that they are *bona fide* business entries. Unfortunately Messrs. Sassoon & Co.'s entries with regard to the forward rates did not go beyond the 18th, but up to the 18th they do conform to the entries in Ralli Brothers' book. Then after the 18th Messrs. Ralli Brothers' entries are in respect of the forward rates for shipments from July to December which is the period specified in the contract, with which we are concerned. Those rates on the 19th August were Rs. 7-7, on the 20th of August Rs. 7-10, on the 21st

August Rs. 8 for ready, and the rate for forward August-December Rs. 7-11. The learned Judge with regard to that has simply said this, "with regard to the evidence on behalf of the defendant most of the contracts were settlement contracts." Well, it may be so; the contract to which the witness referred specifically may have been a settlement contract, but I may point out here that with regard to the entries made in the book Ram Kumar Bhakat has said, "there were buyers and sellers in the market for ready and forward goods—otherwise there can be no rates." Then the learned Judge goes on to say "Messrs. Ralli Brothers' Bantia, who was examined said that Ralli Brothers were not sellers at the rate mentioned by him. He could not say whether they were sellers at Rs. 8 or not. He said he did not know. This I find difficult to accept." It seems to me, with great respect to the learned Judge that he has not given sufficient consideration to the very cogent evidence, which was put forward by this representative of Messrs. Ralli Brothers in respect of the entries in the book. Further than that, there was evidence given by a witness called Manna Lall, who spoke to a particular transaction of the 19th of August "for September to December shipment at the price of Rs. 7-3" and with regard to him, the learned Judge says "There was another witness named Manna Lall who purported to give evidence of an actual sale. It is difficult to say from his evidence as to what the nature of that transaction was. It seems to me to have been in the nature of a settlement, in which the defendant was concerned." Now, the evidence was that it was not in the nature of a settlement, and there was not any ground for the statement that Manna Lall and the defendant were connected in some shape or form with the transaction. These are the grounds for my saying,

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with great deference to the learned Judge that he has not given sufficient consideration to the evidence on this point. But the matter does not stop there. Supposing I am not satisfied that the evidence of the defendant has been sufficiently appreciated, what is the position? I have to consider now upon the evidence what are the rights of the parties, and I think that if I were now to proceed upon the evidence which is before me, to assess the damages upon a correct basis and upon the right principle as laid down by the authorities, as far as I understand Mr. Mitter, I should have to come to the conclusion that the plaintiff would be entitled to more damages than the learned Judge has already awarded him, and I will now proceed to say why. The principle upon which the damages should be assessed is this: I am reading from a passage in Leake on Contracts, 6th Edition, page 638, which correctly states the law on the point, "where there is a contract for the sale and delivery of goods at a future time, or in instalments at future times a notice by the seller to the buyer of his intention not to deliver may be accepted and acted upon as an immediate breach, and the buyer is *prima facie* entitled to damages measured by the difference between the contract price and the market price at the appointed time or times of delivery, leaving it to the seller to show in mitigation that he could in the interval have obtained a new contract upon better terms, or if the time for delivery has not elapsed when the damages are assessed, the future damages must be estimated prospectively." To make it perhaps clearer I may refer to *Roper v. Johnson* (1) where there was a contract to deliver coal during certain months and where the defendant refused to deliver any coal, and the plaintiff brought an action for

damages for this breach. It was held that in the absence of evidence on the part of the defendant—that the plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivering, notwithstanding that the last period had not elapsed when the action was brought, or when the cause was tried. Therefore, I repeat that if I had to begin now and assess the damages afresh upon the true basis, I should have to consider first of all what was the contract price that was fixed by the contract, and I should have to ascertain from the evidence what the market price was in August, September, October, November and December, and then to subtract the contract price from the market price at the appointed times of delivery in each month, and add the differences together, in order to make out the total amount of damages. It is in evidence that from August the market was a rising market. Then we have the evidence that the market price increased, until it rose to something like Rs. 10, perhaps even more, Rs. 10-1 anna. Therefore I say that if I had to begin now to assess the damages again, as far as I can see according to the evidence, I should have to award to the plaintiff a larger sum than that which he has obtained under the judgment of the learned Judge. Therefore, although I cannot say that the judgment which the learned Judge has given is good with regard to the way in which he has treated the defendant's evidence, I am not in a position to say that the plaintiff ought to be awarded less damage than what the learned Judge has given him. If I had to disturb this judgment, I should have to proceed to assess the damages upon the above-mentioned principle, and according to the evidence I

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should have to award to the plaintiff more than what he has already obtained, and for this reason I do not think that it would be right for me to disturb the judgment of the learned Judge.

I think this covers all the points which have arisen in this appeal.

The appeal must, therefore, be dismissed with costs.

WOODROFFE J. On the question of the market rate we have been asked to say that the finding of the learned Judge that the rate in August and September to December was Rs. 8, is wrong. If the evidence be closely examined, it will be found that the only item which directly bears upon the appellant's argument is that which was given by the witness Ram Kumar Bhakat the sugar banian of Messrs. Ralli Brothers. The question in this case is not in my opinion so much the issue whether if we had heard the case ourselves we should or should not have preferred his evidence to that given on behalf of the plaintiff, but whether that evidence having been rejected by the learned Judge, it is by itself sufficient to enable us to hold that the judgment on this point is erroneous. I refer to the evidence of Ram Kumar Bhakat because the evidence of the witness Narendra Krishna was not relied upon on behalf of the appellant; and the only other witness is the 3rd witness Manna Lall. He states that on the 19th August 1914 he purchased 50 tons of September to December Shipment at Rs. 7-3 from one Jankidass Bulla Bux. The rate at which that sale was effected is different from and lower than that given as the market rate on the same date by the witness Bhakat and is a lower rate than that which it is contended by the 12th ground of appeal should have been awarded to the plaintiff.

What then is the evidence of Bhakat upon which the appellant's arguments rests. He is the sugar banian of Messrs. Ralli Brothers and is certainly an important witness. He states that the rate of ready goods on the 19th August was Rs. 7-7; for forward goods deliverable July to December same rate; and on the 20th August ready goods were quoted at Rs. 7-10 and forward for the the same months at the same rate. Now, against this we have it upon the evidence of this witness that there was on the 19th a sale to Messrs. Shaw, Wallace and Co., at a rate which was higher than that which is stated to be the market rate on the 19th August and on the 20th August we have a sale to Messrs. Ralli Brothers at Rs. 7-8 which is lower than what was stated to be the market rate for the 20th August. We further have it that when the witness was asked whether if any one wished to purchase from him from the 17th to 20th August he would have sold at the rate at which he had sold to Messrs. Ralli Brothers on those dates, he replied that he would have sold to Messrs. Ralli Brothers and Shaw, Wallace and Co. if they wished to buy, but he would not sell to other buyers at this rate. When he was asked at what rate he would have sold to them he made a somewhat vague statement that the rate would depend upon the parties—annas 1, 2, 3 or higher according to the customers. He was further asked whether Messrs. Ralli Brothers whose banian he was were prepared to sell at Rs. 8. With regard to this he says he did not know; he could not say. With regard to this portion of his evidence Mr. Justice Chaudhari finds some difficulty in accepting it. And speaking for myself I think I should have found some difficulty considering what the position of the witness was, namely, he was the banian of Messrs. Ralli Brothers and so far as the sugar business of

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Messrs. Ralli Brothers was concerned he was in fact the representative of Messrs. Ralli Brothers. This witness, however, affords strong corroboration to another piece of evidence given on behalf of the plaintiff when he states that the market went steadily up and that the rate upon the day on which he gave evidence was as high as Rs. 10-1. Now, the question before us on this matter is one of pure fact. There is evidence which supports the learned Judge's finding, though it is true that some of the criticisms which have been passed on it may be said to be well founded. On the other hand I am clearly of opinion that it is not sufficient to show, as it is incumbent on the appellant to show, that the evidence before us is such that the finding is so clearly erroneous that it should be reversed.

As regards the question of construction of the contract and that it was not in fact repudiated until the 18th of August and as regards the rate as regards the July shipment, I agree with what has been said by the Chief Justice. I have nothing further to add. I agree with him that the appeal should be dismissed.

MOOKERJEE J. This is an appeal by the defendant in a suit for damages for breach of a contract, made on the 4th June 1914, for delivery of 300 tons of Brown Java Sugar by him to the plaintiff at the rate of Rs. 6-0-6 per matund. The contract provided that the shipments would be made by steamers during July to December 1914, and that any shipment might be made within seven days after the expiry of the particular month. After this contract had been made, war was declared on the 4th August 1914; six days later, the seller wrote to the buyer and asked him to bear the extra war insurance. The purchaser replied that he was bound by the contract and was prepared to carry

ont all and only such obligations as were included in its terms. The result of further correspondence was that on the 18th August 1914, the seller intimated to the purchaser that he had definitely cancelled the contract; the present suit was thereupon instituted on the 26th August 1914. The plaintiff claimed damages for the July instalment at the difference between the market rate on the 20th August 1914 and the contract rate. As regards the August instalment, he claimed damages at the difference between the forward rate on the 20th August 1914 and the contract rate. For the later instalments of September, October, November and December, he claimed damages at the same rate. Mr. Justice Chaudhuri has decreed the claim in full. That decree has been assailed before us substantially on two grounds: the first raises the question of the true interpretation of the contract; the second involves the question of the principle on which damages should be assessed.

In support of the first ground, it has been argued that upon a true construction of the contract, the seller was under no obligation to deliver the goods by monthly instalments and that, in fact, he was at liberty to deliver the goods in one instalment on any date between the 1st July and the 31st December 1914. This contention is, in my opinion, entirely unfounded. It is well settled that an agreement to accept delivery by instalments, may, in the absence of an express agreement, be inferred from the conduct of the parties and circumstances of the case: *Thornton v. Simpson* (1), *Tarling v. O'Riordan* (2), *Colonial Insurance Co. of New Zealand v. The Adelaide Marine Insurance Co.* (3).

The contract in the present case does not expressly

(1) (1816) 6 Taun 556

(2) (1878) 2 L. R. Ir. 82.

(3) (1886) L. R. 12 A. C. 128, 138.

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state that the goods were to be delivered in monthly instalments, much less that the instalments were to be of equal quantities. But there are indications in two paragraphs of the instrument, namely, the twelfth and the sixteenth, that the parties contemplated delivery in instalments. This, however, is not decisive of the question, whether the buyer could insist upon delivery by instalments; that must be determined with reference to the conduct of the parties and the circumstances of the case. Now, if we look to the correspondence between the parties which preceded the institution of this suit, we find that on the 10th August 1914 the seller referred to "the July and August portions of the contract," which he stated were ready for despatch from Java. On the 18th August, the purchaser referred to "my July shipment of sugar." On the 19th August, the solicitors of the purchaser spoke of the 50 tons which should have been shipped in July, and there is a similar statement in their letter of the 20th August. The second paragraph of the plaint states expressly that the defendant had agreed to deliver sugar to the plaintiff in monthly shipments of 50 tons each, to be made by steamers during July to December 1914. This was not challenged in the written statement, though I do not overlook the comprehensive allegation that whatever was not expressly admitted therein must be deemed to have been denied. An examination of the proceedings before the trial Judge also shows that both parties proceeded on the assumption that the goods were to be delivered in monthly instalments. It is further plain that no business man would read the contract in the way suggested by the appellant; it is impossible to believe that the parties could have intended that the buyer should be entirely at the mercy of the seller, and that the latter was at liberty to deliver the goods either in one or in

many instalments just as suited his convenience. I hold accordingly that the interpretation which the appellant now seeks to place upon the contract should not be accepted. It is further clear that in the absence of any indications to the contrary [as in *Calaminus v. Dowlais Iron Co.*(1)], the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of the goods: *Coddington v. Palologo* (2).

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In support of the second ground, which treats of the question of the measure of damages, the judgment of Mr. Justice Chandhuri has been criticised on the ground that he has not correctly appreciated the evidence and that he has in fact ignored what was weighty evidence in favour of the appellant. Our attention has been drawn specifically to three points in the judgment. *First*, that it minimizes the effect of the evidence as to the market rates given by the defendant, on the ground that the evidence related to the rates of settlement contracts; it has been pointed out that a similar criticism may validly be directed against the evidence on behalf of the plaintiff which has been accepted and has been made the foundation of the decision. *Secondly*, the rates for the settlement contracts have not been treated as relevant evidence; it has been pointed out with considerable force that the rates for settlement contracts must affect the market rate, and must, therefore, afford more or less valuable evidence relevant to the subject under discussion. *Thirdly*, the evidence of the witness Manna Lal has been disregarded on the ground that he has spoken of a transaction in which the defendant was concerned; it has been conceded that there is no evidence on the record which would justify this statement.

It appears to me upon an examination of these

(1) (1878) 47 L. J. Q. B. 575

(2) (1867) L. B. 2 Exch. 193, 197.

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grounds, as also the entire evidence on the record, that the judgment under appeal is open to valid criticism. That, however, does not justify the conclusion that the decree must be reversed. The question for adjudication is, what is the principle upon which damages should be assessed. If the damages have been assessed upon an erroneous principle, the judgment cannot stand; but it does not follow that the appellant is entitled to a reduction of the amount specified in the decree; he must satisfy the Court that on the correct principle he is not liable for the amount decreed against him.

The principle applicable to cases of this description may be concisely stated. The general principle is that where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for non-delivery. The measure of damages is the estimated loss directly resulting from the seller's breach of contract. Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they should have been delivered; the principle is lucidly stated by Lord Atkinson in the case of *Wertheim v. Chicontimi Pulp Co.* (1): "It is the general intention of the law that, in giving damages for breach of contract, the party complaining should as far as it can be done by money, be placed in the same position as he would have been in, if the contract had been performed. That is a ruling principle. It is a just principle. The rule which prescribes as a measure of damages, the difference in market prices at the respective times above mentioned is merely designed to apply this principle, and as stated in one

of the American cases cited [*Grand Tower Co. v. Phillips*(1)], it generally secures a complete indemnity to the purchaser. But it is intended to secure only an indemnity. The market value is taken, because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him if he had them, what they would fetch in the open market; and that, if he wanted to get others in their stead, he could obtain them in that market at that price." This principle has been applied to cases in which there is an agreement to deliver goods in instalments and the contract is repudiated before the time for performance arrives. The leading decision on the subject is that in the case of *Roper v. Johnson*(2) which accords with *Frost v. Knight*(3) and *Brown v. Muller*(4). In that case, the defendants contracted to sell to the plaintiffs 3,000 tons of coal to be taken during the months of May, June, July and August. The plaintiffs having failed to take any coal in May, the defendants on the 31st of that month, wrote to the plaintiffs to consider the contract cancelled. The plaintiffs on the next day replied, refusing to assent to this, and sent to take coal under the contract on the 10th of June, when the defendants positively refused delivery. That action was commenced on the 3rd of July. Three propositions were laid down in the case: *first*, that, on the authority of *Simpson v. Crippin*(5), the defendants had no right to rescind the contract by reason of the plaintiffs' default in not sending to take the May delivery; *secondly*, that the plaintiffs had elected to treat the positive refusal of the defendants on the 10th

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(1) 10 U. S. 471

(3) (1872) L. R. 7 Ex. 111.

(2) (1873) L. R. 8 C. P. 167.

(4) (1872) L. R. 7 Ex. 319.

(5) (1872) L. R. 8 Q. B. 14.

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of June as a breach of the contract on that day; *thirdly*, that in the absence of any evidence on the part of the defendants that the plaintiffs could have gone into the market and obtained another similar contract on such terms as would mitigate their loss, the measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery, although the last period fixed for delivery had not arrived when the action was brought or the cause tried. There is an instructive passage in the judgment of Mr. Justice Brett, as he then was, to which reference may be made. "To entitle a plaintiff to recover damages in an action upon a contract, he must show a breach, and that he has sustained damage by reason of that breach.... The general rule as to damages for a breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed... Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods, before the day for performance, as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach... The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; and when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance and not at the time of breach... It seems to me to follow... that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that *prima facie* that is the proper

measure of damages : leaving it to the defendant to show circumstances which would entitle him to a mitigation. No such circumstances appeared here: there was nothing to show that the plaintiffs ought to have or could have gone into the market—a rising market—and obtained a similar contract." In the case before us, the damages have been assessed on a different principle, and, as I read the authorities, on an erroneous principle. The method propounded by the appellant is equally erroneous. If the damages had been assessed on the correct principle, the evidence shows that the plaintiff would have been entitled to a larger sum than what has been awarded to him. But Mr. Mitter has contended that the Court should not now consider a case inconsistent with that expressly made in the plaint. The appellant, however, cannot invite the Court to set aside the judgment of the trial Judge and make a decree in his favour on what the Court considers an erroneous basis. Nor can the case be sent back, for the remand would be fruitless from the point of view of the appellant; the result will be that the plaintiff will on remand get a larger sum than what has been awarded to him. I hold, accordingly, that the decree as made by Mr. Justice Chaudhuri should stand.

J. C.

Appeal dismissed.

Attorneys for the appellants : *R. M. Chatterjee & Co.*
 Attorneys for the respondent : *Watkins & Co.*

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LETTERS PATENT APPEAL.

Before Jenkins C. J., Borkerjee and Richardson J.J.

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Lease—“*Istemrari mokarari*,” meaning of the expression, lexicographical and customary—*Tenure*—perpetuity of—What covenants and circumstances favour the theory of perpetuity—Meaning of words in a document, whether a question of fact or law—*Right of parties to a contract, how governed*.

The expression “*istemrari mokarari*” does not *per se* convey, either lexicographically or by way of custom, an estate of inheritance; but an *istemrari mokarari patta*, notwithstanding the absence of words indicative of heritability, such as *ba furzandan, naslan bad naslon* or *al-aulad*, may indicate a perpetual grant, if the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties, show such an intention with sufficient certainty.

Clauses in a lease which impose a restraint on transfer or cutting down of fruit-bearing or income-yielding trees by the lessee are not consistent with the theory of a perpetual lease.

Clauses which throw the cost of improvement on the lessee indicate some measure of continuity, but not necessarily perpetuity.

A lease in favour of two persons points to the conclusion that, though some measure of continuity was desired, perpetuity was not intended.

A substantial premium for a lease is one of the surest indications of a permanent grant.

Tulshi Pershad Singh v. Ramnarain Singh (1) analysed and followed.

Tulsinarain Sahu v. Baboo Modnarain Singh (2), *Ameeroonissa Begum v. Hetnarain Singh* (3), *The Government of Bengal v. Nawab Jafur*,

* Letters Patent Appeals, Nos. 2 to 17 of 1914, in Appeals from Original Decrees Nos. 66, 82 to 96 of 1910.

(1) (1885) I. L. R. 12 Calc 117; (2) (1848) S. D. A. 752; L. R. 12 I. A. 205. (3) (1853) S. D. A. 648. 10 I. D. (O. S.) 532.

Hossein(1), *Sarobur Singh v. Raja Mahendernarain Singh*(2), *Raja Lilanand Singh Bahadur v. Thakur Munorunjun Singh* (3), *Sheo Pershad Singh v. Kally Dass Singh* (4), *Bilasmoni Dasi v. Raja Sheopersad Singh* (5), *Beni Pershad Koeri v. Durdhanlal Roy* (6), *Agin Bindh Upalhya v. Mohan Bilram Shah* (7), *Narsingh Dyal Sahu v. Ram Narain Singh* (8) and *Choudhri Gridhari Singh v. Maharaj Ram Narain Singh* (9) followed.

Munrunjun Singh v. Rajah Lelanund Singh (10), *Tekait Manoraj Singh v. Raja Lilanand Singh* (11) *Rajah Leelanund Singh v. Thakoor Monorunjun Singh* (12), *Mussamat Lakhu Konwar v. Roy Hari Krishna Singh* (13), and *Karunakar Mahati v. Nilathro Chowdhry* (14) overruled.

Watson v. Mohesh Narain Roy (15) referred to.

The meaning of words in a document is a question of fact, though the effect of words is a question of law.

Chatenay v. Brazilian Submarine Telegraph Company (16) followed.

The rights of parties to a contract are to be judged by that law by which they may justly be presumed to have bound themselves.

Lloy l v. Guibert (17) and *Abdul Aziz Khan v. Appiyasami Naicker* (18) followed.

Where a lease is in favour of two persons and the lease would not terminate till the death of the survivor of the two lessees, no question of limitation can arise before the death of both the lessees.

Quere. Whether the mode in which registration of a lease is effected is relevant to an enquiry as to the nature of the lease.

Najibulla Mulla v. Nusir Mistry (19), *Jagatlal Narain Prasad v. Brown* (20) and *Indra Bibi v. Jain Sirdar Ahiri* (21), *Santaj Kuari v. Deoraj Kuari* (22) referred to.

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| (1) (1854) 5 Moo. I. A. 467. | (13) (1869) 3 B. L. R. A. C. 226 ;
12 W. R. 3. |
| (2) (1860) S. D. A. 577. | (14) (1870) 5 B. L. R. 652 :
L. R. Sup. Vol. 181. |
| (3) (1873) 13 B. L. R. 124 ;
L. R. 9 I. A. 33. | 14 W. R. 107. |
| (4) (1879) I. L. R. 5 Calc. 543, 555. | (15) (1875) 24 W. R. 176. |
| (5) (1882) I. L. R. 8 Calc. 664 ,
L. R. 9 I. A. 33. | (16) [1891] 1 Q. B. 79. |
| (6) (1899) I. L. R. 27 Calc. 156 ,
L. R. 26 I. A. 216. | (17) (1865) 6 B. & S. 100, 133 ;
122 E. R. 1134. |
| (7) (1902) I. L. R. 30 Calc. 20. | (18) (1903) I. L. R. 27 Mad. 131 ;
L. R. 31 I. A. 1. |
| (8) (1903) I. L. R. 30 Calc. 883 | (19) (1881) I. L. R. 7 Calc. 196. |
| (9) (1906) 10 C. W. N. colxxv. | (20) (1906) I. L. R. 33 Calc. 1133. |
| (10) (1865) 3 W. R. 84. | (21) (1907) I. L. R. 35 Calc. 845. |
| (11) (1865) 2 B. L. R. A. C. 125 n. | (22) (1883) I. L. R. 10 All 272 ,
L. R. 15 I. A. 51. |
| (12) (1866) 5 W. R. 101. | |

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—
RAM NARAIN
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v.
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ASSOCIATION.

LETTERS PATENT APPEAL.

Before Jenkins C. J., Mookerjee and Richardson J.J.

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Aug. 25.

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v.

CHOTA NAGPUR BANKING ASSOCIATION.*

Lease—"Istemrari mokarari," meaning of the expression, lexicographical and customary—Tenure perpetuity of—What covenants and circumstances favour the theory of perpetuity—Meaning of words in a document, whether a question of fact or law—Rights of parties to a contract, how governed.

The expression "istemrari mokarari" does not *per se* convey, either lexicographically or by way of custom, an estate of inheritance; but an *istemrari mokarari patta*, notwithstanding the absence of words indicative of heritability, such as *ba farzandan, naslan baln naslan* or *al-aulad*, may indicate a perpetual grant, if the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties, show such an intention with sufficient certainty.

Clauses in a lease which impose a restraint on transfer or cutting down of fruit-bearing or income-yielding trees by the lessee are not consistent with the theory of a perpetual lease.

Clauses which throw the cost of improvement on the lessee indicate some measure of continuity, but not necessarily perpetuity.

A lease in favour of two persons points to the conclusion that, though some measure of continuity was desired, perpetuity was not intended.

A substantial premium for a lease is one of the surest indications of a permanent grant.

Tulshi Pershad Singh v. Ramnarain Singh (1) analysed and followed.

Talsinarain Sahu v. Baboo Modnarain Singh (2), *Ameeroonissa Begum v. Hetnarain Singh* (3), *The Government of Bengal v. Nawab Jafur*

* Letters Patent Appeals, Nos. 2 to 17 of 1914, in Appeals from Original Decrees Nos. 66, 82 to 96 of 1910.

(1) (1885) I. L. R. 12 Calc 117; (2) (1848) S. D. A. 752; L. R. 12 I. A. 205. (3) (1853) S. D. A. 648. 10 I. D. (O. S.) 532.

Houssein(1), *Sarobur Singh v. Raja Mahendernarain Singh*(2), *Raja Lilanand Singh Bahadur v. Thakur Monorunjun Singh* (3), *Sheo Pershad Singh v. Kally Dass Singh* (4), *Bilasmoni Das v. Raja Sheoprasad Singh* (5), *Beni Pershad Koeri v. Duthnath Roy* (6), *Agin Binab Upadhyay v. Mohan Bikram Shah* (7), *Narsingh Dyal Sahu v. Ram Narain Singh* (8) and *Choudhri Gridhari Singh v. Maharaj Ram Narain Singh* (9) followed.

Munrunjun Singh v. Rajah Leelanand Singh (10), *Tekut Manoraj Singh v. Raja Lilanand Singh* (11) *Rajah Leelanand Singh v. Thakoor Monorunjun Singh* (12), *Mussamat Lakhu Koirar v. Roy Hari Krishna Singh* (13), and *Karunakar Mahati v. Nilalhro Chowdhry* (14) overruled.

Watson v. Mohesh Narain Roy (15) referred to.

The meaning of words in a document is a question of fact, though the effect of words is a question of law.

Chatenay v. Brazilian Submarine Telegraph Company (16) followed

The rights of parties to a contract are to be judged by that law by which they may justly be presumed to have bound themselves

Lloyd v. Guibert (17) and *Abdul Aziz Khan v. Appayasami Naicker* (18) followed

Where a lease is in favour of two persons and the lease would not terminate till the death of the survivor of the two lessees, no question of limitation can arise before the death of both the lessees.

Quere Whether the mode in which registration of a lease is effected is relevant to an enquiry as to the nature of the lease

Najibulla Mulla v. Nusrir Mistri (19), *Jugatlhar Narain Prasad v. Brown* (20) and *Imra Bibi v. Jai Sardar Ithri* (21), *Sartaj Kuars v. Deoraj Kuars* (22) referred to

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| (1) (1854) 5 Moo. I. A. 467. | (13) (1869) 3 B. L. R. A. C. 226 ;
12 W. R. 3. |
| (2) (1860) S. D. A. 577. | (14) (1870) 5 B. L. R. 652 :
14 W. R. 107. |
| (3) (1873) 13 B. L. R. 124 ;
L. R. Sup. Vol. 181. | (15) (1875) 34 W. R. 176. |
| (4) (1879) I. L. R. 5 Calc 543, 555 | (16) [1891] 1 Q. B. 79. |
| (5) (1882) I. L. R. 8 Calc. 664 ,
L. R. 9 I. A. 33. | (17) (1885) 6 B. & S. 100, 133 ;
122 E. R. 1134. |
| (6) (1899) I. L. R. 27 Calc 156 ,
L. R. 26 I. A. 216. | (18) (1903) I. L. R. 27 Mad. 131
L. R. 31 I. A. 1. |
| (7) (1902) I. L. R. 30 Calc. 20. | (19) (1881) I. L. R. 7 Calc. 196. |
| (8) (1903) I. L. R. 30 Calc. 883. | (20) (1906) I. L. R. 33 Calc. 1133. |
| (9) (1906) 10 C. W. N. cxlvxxv. | (21) (1907) I. L. R. 35 Calc. 845 |
| (10) (1865) 3 W. R. 84. | (22) (1888) I. L. R. 10 All 272 ;
L. R. 15 I. A. 51. |
| (11) (1865) 2 B. L. R. A. C. 125 n | |
| (12) (1866) 5 W. R. 101. | |

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LETTERS PATENT APPEALS by Maharaja Ram Narain Singh, the plaintiff.

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These 16 appeals arose out of as many suits for resumption of several villages leased out in *mokarari istemrari* and for mesne profits. The leases were granted between 1864 and 1866 by Raja Ramnath Singh, of Ramgarh, an ancestor of the present plaintiff, and, in two cases, by Musammats Heera Koeri and Prem Koeri with the previous sanction of the said Raja, he being the next reversioner. The allegation in the plaints was that the leases were for life only of the grantees and that they were dead. The defendants were the heirs of the original *mokararidars* or their heirs and transferees. Their main contention was that the expression *mokarari istemrari* conveyed a hereditary interest and that they were not liable to ejectment. The Subordinate Judge, who heard the suits, upheld the contention of the defendants and dismissed the suits. The plaintiff appealed to the High Court. The appeals were heard by Woodroffe and Coxe JJ.; their Lordships differed in opinion, and delivered the following judgments:—

WOODROFFE J. These are sixteen analogous suits by a zamindar for the resumption of land leased out in *mokarari istemrari* on the allegation that the grantees are dead and that their interest was for life only. They are all governed by the same judgment, which is given in the first appeal, viz., No. 66 of 1910. The plaints and written statements of the contesting parties in all suits are, subject to what is next stated, practically in similar terms. In Appeal No. 66 of 1910 and thirteen other appeals, in which learned counsel have appeared, the respondents are purchasers for value, and these appeals present for consideration the same questions. These arise also again in Appeals Nos. 84 of 1910 and 96 of 1910, brought against the original grantees, heirs and a transferee respectively. In Appeal No. 84 (Suit No. 14), issues 2a and 2b are omitted and the following issue added,—“Did the defendant reclaim any lands? If so, what land? Are they entitled to any compensation for this, and can the plaintiff get khas possession of them?” The learned Judge has held upon this issue that the respondents did reclaim some lands, but that they were

not entitled to compensation. If the appellants make out their case that the leases in suit were for life only, then the respondent is not entitled to compensation, for though it was sought to be argued before us that the appellants were equitably estopped in this matter, no such issue was raised and cannot therefore be gone into in this Court. The same observations apply to the arguments addressed to us that the appellants were barred by limitation and that, by 12 years' occupation, occupancy rights had been acquired in the land. These special grounds fail and this appeal must be determined on the main issue common to it and the others.

In Appeal No. 96 of 1910 (Suit No. 110), the respondents are heirs of *dar mokararidars* and it is argued with reference to the general issue that, as the original grant was on the 7th October, 1865, and previously on the 17th June, 1863, the High Court had decided that the words *mokarari istemrari* meant a perpetual and hereditary lease, the grant must be construed with reference to such decision : secondly, that even if the general contention fails, viz., that the leases were permanent heritable leases, then as the heir of one of the original grantees is alleged to have been recognised by the zamindar as tenant and is still living, the suit is not maintainable : thirdly, that the zamindars recognised the *dar-mokararidars* as tenants and cannot eject them without notice : fourthly, the plea of limitation was taken before us. There was no issue raised as to this and it cannot be gone into now upon the question of the landlord's recognition, for reasons subsequently given. The other special defences taken in this appeal in my opinion fail, and it must also, as the last, be determined on the main issues common to it and the others.

The plaintiff allege the land was let to the defendants on a lease which came to an end with the death of the lessee or surviving lessee, where more than one, but that possession was refused on the allegation that the leases were permanent leases with heritable interest. This allegation the plaintiff denies asserting that the leases came to an end with the death of the lessee or surviving lessee. The learned Judge has upheld the contention of the defendants and dismissed the suit, and against this decision plaintiff appeals.

The circumstances in connection with the grant of the leases are shortly these : The lessor was Raja Ram Nath Singh, a former Raja of Raingarh, who died towards the close of 1866. Prior to the year 1864, the Raja had been in the habit of letting out his lands on short *teeka* leases. This method was found apparently unsatisfactory, and with a view to improve the lands, diminish his debts, which were then considerable, and facilitate the collection of rent, Raja Ram Nath let out a very large portion of his zamundari in *mokarari istemrari*, and was apparently willing to let out the whole in this way if he could find tenants. The question in issue here is as to the

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meaning of these terms in the leases in question. Six hundred and forty-four *mokarari istemrari* leases were executed between the 27th November, 1864, and the 22nd September, 1866. The learned Judge has found that the previous rents were doubled. There is some dispute as to this, but a considerable enhancement was made and a year's premium (*natarana* or *salami*) was taken. It is important to note that the Land Tenure Report, which has been put in evidence, states that this form of lease was then entirely new in the zamindari. Prior to these leases and during the years 1848 to 1860, the Sudder Dewani Adalit held by several decisions given in the years :848, 1853, 1860 that an *istemrari mokarari* lease did not import perpetual heritable interest unless there were express words of inheritance such as *naslan bad naslan* (generation after generation) and the like. The first of the 644 leases was in the year 1864, before the decision in the Ghatwali case *Munrunjun Singh v. Rajah Lelanund Singh* (1) in which it was held that the interest there dealt with was hereditary. For the appellant it has been contended that, if upon the question of the construction of these leases, reference is made to the state of the law then existing, the law was the words *mokarari istemrari* did not convey an heritable interest. For the respondents it has been argued that in any event leases executed after the High Court decision in 1865 (1), should be construed as heritable because that decision expressed the law when they were granted. This argument was put forward and I think rightly disposed of, in previous suits relating to this estate, to which I later refer, on the ground that the case of *Munrujjun Singh v. Rajah Lelanund Singh* (1) was a peculiar case opposed to the previous current of decisions.

Raja Ram Nath died leaving him surviving his mother Sm. Prem Koeri, and his widow Sm. Heera Koeri, the mother of a posthumous son Triloknath. The latter died shortly after his birth. Thereupon litigations broke out between the widow Heera Koeri and Nan Narain Singh, who belonged to the junior line of Tej Singh, the common ancestor. During this period, in 1869, the High Court held in the case of *Mussamat Lakhoo Koerar v. Roy Hari Krishna Singh* (2) that a *mokarari istemrari* grant there considered was a perpetual and heritable interest. From 1866 to 1873 the estate was in the hands of the Court of Wards. During this same period in 1871, a suit for resumption of one of the *mokararis* was brought by the mother Sm. Prem Koeri. In this case the grant had been made by her with the assent of her son Ram Nath of this *maura* given by him to her for maintenance in Deorhi. This suit was dismissed in March, 1872, on the ground that the words *mokarari istemrari* in the *patti* conveyed an heritable interest. The

Deputy Commissioner of Barrabagh, who decided the case, followed the High Court decision last noted. After the death of Heera Koeri, and in August, 1873, the Court of Wards made over the estate to Nam Narain Singh. The latter, in 1875, brought a suit for resumption against a *mokararidar*, named Amir Khan. This was dismissed on the ground that the words *mokarari istemrari* gave an heritable interest to the grantee. The decision was upheld by the High Court in 1877, which, following the previous decision (1), held that the words *mokarari istemrari* of themselves purported to give a perpetual and heritable tenure.

Previous to this decision the Judicial Committee had heard an appeal from the Ghatwali case *Munrunjun Singh v. Rajah Lalanund Singh* (2) and held that whilst it was doubtful whether the words *mokarari istemrari* meant permanent during the life of the person to whom they were granted or permanent as regards hereditary descent, yet that coupling these words with the usage proved in that case the tenures were, as the High Court held, hereditary. This decision was followed by the High Court in *Sheo Pershad Singh v. Kally Dass Singh* (3), which was heard by the Chief Justice who decided Amir Khan's suit. This was a case of a *mokarari* lease, but in the course of the judgment Sir Richard Garth said that great respect was due to the decisions of the Sudder Dewani Adalat holding that even when coupled with the word *istemrari* the word *mokarari* did not denote an hereditary estate and that the use and meaning of such a technical term in a lease was understood at least as well thirty or forty years previously as it was then in 1879. On appeal to the Judicial Committee (4), it was held that the word *mokarari* does not necessarily import perpetuity, though it might do so, and that though the Committee did not concur in all the views taken by the High Court of the provisions in question, yet on the other hand they did not find in them sufficient to show an intention that the lease should be permanent. There then followed in 1885 a decision of the Judicial Committee, the proper construction of which has been the subject of argument in this appeal, but which, upon the contention advanced by the appellant, held that the words *mokarari istemrari* do not *per se* import an heritable interest. It was then held upon a review of all the preceding decisions that the words *mokarari istemrari* in a *patta* granting land do not of themselves denote that the estate granted is an estate of inheritance. It was there however also held that it could not be said that such an estate would not be granted, unless in addition to the above words, such expression as "ba furzandan" or "naslan bad naslan" or similar terms are

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(1) (1869) 3 B. L. R. A. C. 226;

(3) (1879) I. L. R. 5 Calc. 543

12 W. R. 3.

(4) (1882) I. L. R. 8 Calc. 664;

(2) (1865) 3 W. R. 84

L. R. 9 I. A. 33

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used. For without the latter, the other terms of the instrument, the circumstances under which it was made, or the conduct of the parties may show the intention with sufficient certainty to enable the courts to pronounce the grant to be perpetual, the words *molarari istemrari* not being inconsistent therewith, though not themselves importing it : *Tulshi Pershad Singh v. Ramnarain Singh* (1). As the Allahabad High Court has pointed out what the Judicial Committee here held was that the mere use of the terms *molarari istemrari* does not *ex iei termini* make the instrument in which they appear such as to create an estate of inheritance. But they also say that words *naslan bad naslan* and the like need not necessarily be inserted to constitute a grant in perpetuity, and that the words *molarari istemrari* accompanied by other words and illustrated by the subsequent conduct of the parties may show that an estate of inheritance was created : *Gaya v. Ramjiajan Ram* (2). This decision was followed in the reported case *Agin Birh Upadhyay v. Mohan Bikram Shah* (3), where it was pointed out that the words *istemrari* and *molarari* are both of Arabic origin and literally mean continuous, running, fixed. Their dictionary meaning is of little use, as they might mean continuous or permanent during the lifetime of the grantee or permanent as regards hereditary descent. Considering the customary meaning of the words as established by judicial decisions, the learned Judges there cited the decision of the Judicial Committee in *Tulshi Pershad Singh v. Ramnarain Singh* (1) in which their Lordships said "After this' review of the decision, their Lordships think it is established that the words *istemrari molarari* in a *patta* do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, as the Judges do not seem to have in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the courts to pronounce that the grant was perpetual." They added :—"As has been said, their Lordships, having regard to the customary meaning of the words, as established by the decisions which have been noticed, are of opinion that they do not convey an estate of inheritance in this case." In *Beni Pershad Kocri v. Dudhnath Roy* (4), their Lordships repeated what they had said in *Tulshi Pershad Singh v. Ramnarain Singh* (1), in the sentence: "An *istemrari molarari* tenure is not necessarily a perpetual hereditary tenure." This Court following the decision of the Judicial

(1) (1885) I. L. R. 12 Calc. 117 ; (3) (1902) I. L. R. 30 Calc. 20

L. R. 12 I. A. 295.

(4) (1899) I. L. R. 27 Calc 156 ;

(2) (1886) I. L. R. 8 All. 569.

L. R. 27. I. A. 216.

Committee held that the words *istemrari mokarari* in the lease in question were not sufficient to create a permanent and hereditary tenure. The last three decisions were concerned with other estates than that before us. For Raja Nam Narain, after having lost *Amir Khan's Case* (1) in 1877, did not pursue his claim further by litigation except in 1884, when, however, a suit which had been instituted was withdrawn (Ext. II. e.) as it was alleged that, owing to the existence of the facts stated in his petition, the case could not be taken as a test one to the Privy Council. In the suit so withdrawn, however, the Raja (Ext. II. i.) reiterated his claim that the *mokararis* were for life only. In fact it may be here observed that it is clear upon the evidence and has been so held by the Subordinate Judge that the zamindar never recognised the claims of heirs to succeed in respect of these *mokararis*.

Raja Nam Narain Singh died in 1899 and was succeeded by Raja Ram Narain, who instituted the present suit, who has since died, and is now represented by his infant son Lukshme Narain, a ward of the Court of Wards. Raja Ram Narain, doubtless, encouraged to do so by the decision of the Judicial Committee in *Tulshi Pershad's Case* (2) and that of the High Court which followed it (3), asserted again by litigation his claim to resume the lands covered by these leases on the death of the grantees. The first of these cases was in 1903 : *Narsingh Dyal Sahu v. Ram Narain Singh* (3). It was there held that the words *mokarari istemrari* in the leases did not primarily import any heritable character in the grant as the term *mouras* does. They import permanency, from which in a secondary sense such heritable character might be inferred, it being always doubtful whether they mean permanent during the lifetime of the grantee or permanent as regards hereditary character. It was further held that the words do not *per se* convey an estate of inheritance, but such an estate can be created without the addition of any other words, the circumstances under which the lease was granted and the subsequent conduct of the parties being capable of showing the intention with sufficient certainty to enable the court to hold that the grant was perpetual. On an examination of the lease and the facts of the case it was held that it was not intended to be perpetual. This was followed in the High Court Appeal No. 89 of 1902 heard by Henderson and Geeld J.J. (*Grudhari Singh v. Maharaj Ram Narain Singh*) in which another of these leases in the same terms as those in suit granted by Maharaja Ram Narain Singh was considered. The Court then stated that the terms of the *patta* to be construed were the same

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(1) (1877) A. A. D. 533 of 1876. (3) (1903) I. L. R. 30 Calc. 883.

(2) (1885) I. L. R. 12 Calc. 117;

I. L. R. 12 I. A. 205

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as those in the *pattas*, the subject of the previous case (1), and the evidence as to the circumstances under which it was granted was practically the same. For the reasons therefore given in the previous case, the Court there held that the lease was not a perpetual hereditary lease. On the 23rd January, 1906, an application was made for Leave to Appeal to the Privy Council, but as the High Court thought that the matter was covered by the decision of the Judicial Committee (2) the application was refused. Application was then made to the Privy Council for Special Leave to Appeal, but as appears from the report (3), the application was refused. It is contended for the appellants that these two decisions practically conclude the question which is again raised and disputed in the present suit in which the evidence is, with the exception of that referring to the registration of the leases, substantially the same as that in the two prior cases decided by this Court.

If, therefore, as the Judicial Committee has held the words *istemrari mokarari* in a lease granting land do not of themselves denote that the estate granted is an estate of inheritance, then (apart from the question whether the words have in the locality acquired any special customary meaning), the question is—whether the intention of the parties is shown by the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties with sufficient certainty to enable the Court, in the absence of words importing perpetuity, to pronounce that the lease was perpetual : *Bilasmouli Dasi v. Raja Sheopersad Singh* (4).

The leave given in the papers of the first appeal may, for the purpose of the main argument in these appeals, be taken as representative of all. According to the appellant all the leases were taken from one draft. This is denied. There are some variations in the leases, but they chiefly refer to the tree cutting clause, as it is called, and do not affect my judgment. The lease mentioned granted to the lessees in Appeal No 66 of 1910 is as follows :

"Sree Sree Maharani Mata,
No 165

We are, Dilu Mahato and Chola Mahato, inhabitants of Maudramo, *Pergana* Rampur, in Hazaribagh.

On filing a petition in the kaclarji, we have obtained *istemrari mokarari* of *maura* Maudramo, one village in *pergana* Rampur, exclusive of *jagir* and *birt* land, coal mines, and subsoil rights, from 1922 Samvat, at an

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| (1) (1903) I. L. R. 37 Calc. 883. | (3) (1906) 10 C. W. N. cclxxv. |
| (2) (1885) I. L. R. 12 Calc. 117; | (4) (1882) I. L. R. 8 Calc. 664, 672; |
| L. R. 12 I. A. 205 | L. R. 9 I. A. 33. |

annual jama of Company's Rs. 672, and we would gladly cultivate and improve the village, and keep the tenants contented, we will construct chars, tanks, ponds and wells, etc., and we will pay the rent as per instalments, month after month. Aswin instalment 2 annas, Kartik 2 annas, Aghan 2 annas, Pous 2 annas, Magh 2 annas, Phagun 2 annas, Chait 2 annas and Baikali 2 annas.

Besides this, we will pay *Dushara salami* Re. 1; *Ghasti salami* Re. 1 and *Phagun salami* Re. 1, altogether Company's Rs. 3 every year. If we keep in arrears even one pie of rent of three instalments, the molarari shall be cancelled and annulled, to which we shall not raise any objection; any objection if taken by us will be deemed false. All losses due to terrestrial vicissitude, drought, inundation, destruction by hail and storm and costs of earthwork. Civil and Criminal Courts will be borne by us. We will forthwith carry out the orders of the Court and of the Sarkar. We shall not in any way directly or indirectly do anything injuriously affecting the boundaries of the *halka* of the said village, nor shall we allow others to do so. If we do not carry out the orders of the Court and of the Sarkar, then we shall be responsible for the same. We have no power to transfer the said village in any way; if we make a transfer it will be invalid. We have, therefore, willingly executed this *labulyat* of *istemrari molarari* settlement in the Lachari, so that it may serve as a *samad* in future. We shall not cut down any fruit-bearing tree, or tree yielding(?) If any tree falls down by itself, we shall plant another tree on its site. The 15th Aswin Badi, 1922 Sambat.

(Sig.) Bakshi Kesho Das, at the Ichak kachari.

This *Labulyat* of *istemrari molarari* executed by us is correct

Dilo Ram Mahato and Chola Ram Mahato."

The question then is—Did this and the other leases in suit convey a permanent heritable interest—as the defendants allege, or an interest, the duration of which was limited to the lives of the lessees only as the plaintiff, appellant, contends?

The issues framed were as follows—(i) Did the *molarari istemrari* lease granting the village in suit to the original grantees secure any heritable interest to the heirs or was it for the life only of the original grantees? (ii) Have the words *molarari istemrari* any special customary meaning? (iii) Is the plaintiff estopped by the statement of the original grantor made at or about the time of the grant, from claiming that the lease came to an end on the death of the surviving grantees? (iv) Did the plaintiff or his predecessors take any rent from, or acknowledge the right of, the heirs, assignees or sub-lessees under these or similar grants, and if so, is the plaintiff estopped by any such conduct? (v) Was a notice to quit necessary? (vi) Is the plaintiff entitled to any mesne-profits and if

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so, how much? (v) To what relief, if any, is the plaintiff entitled? The learned Judge has decided issues (2a) and (2b) in favour of the plaintiff and the rest against him, as the learned Judge has held the onus in this matter lies on the defendants. It is admitted that the lands in suit lie within the plaintiff's zamindari. The death of the grantee is admitted. The plaintiff's general title therefore is admitted. If therefore the defendants in order to defeat his *prima facie* claim to resumption and their possession set up a subsisting intermediate tenure of a permanent heritable interest under the leases in suit, they must show that there is a lease now in existence which is operative to convey such an interest. There are, as appears from the lease, no words which state or import perpetuity unless it is shown that, according to customary usage in Hazaribagh district, the words *molarari istemrari* have that meaning. There is no other clause or term in the lease which mentions heirs or directly gives an heritable interest. The only clause in the lease on which the respondents rely in direct aid of their case that the grant was perpetual is that relating to what they call 'improvements.' This clause runs "We will gladly cultivate and improve the village. We will construct *ahars* (reservoirs), tank, ponds, wells, etc." It is contended that the lease does not cast an obligation on the lessees to make improvements, but if it does, these are not matters requiring great enterprise and expense, but such, that unless undertaken, no profit could accrue to the lessees from the land. Further as the learned Judge has observed as regards improvement clauses in general, if it may be argued on the one hand that lessees will not undertake improvements unless guaranteed permanency of tenure, there is on the other hand the unlikelihood that the lessor would part for ever with the improvable value of the land, making himself and his heirs mere annuitants. In the present case the learned Judge has thought that the lessor did so, as he finds that there was such a consideration for the leases as to warrant this conclusion, which is based on his finding that the rental was enhanced to its highest pitch and one year's premium was given. It is not, however, in my opinion, established that the rents were enhanced to their highest pitch or that the rental and one year's *salami* was a consideration making it likely that the Raja parted with all interests in the land other than a reversion. There is evidence which warrants the conclusion that the rental asked was not always the most beneficial which could be obtained and in some cases a premium (*salami*) of a year's rent was taken, and in others sought to be obtained from *teccadars*, and in the admittedly perpetual leases put in evidence, *salami* taken was a great deal more than a year's rent, varying from over double to 266 times the rental. It is to be noted in this connection that in the admittedly perpetual leases the *nazarana* or *salami* was expressly mentioned in the document which was not done in

the leases in suit. Further, upon this question of improvements it is to be remembered that the majority of the leases being for two lives, they were likely to run for a very considerable time and so give the tenants full compensation for any improvements they did in fact make in terms of the lease. It is doubtless the fact that greater improvements than were apparently contemplated by the leases were made, such as the tea garden and bungalow laid out and built by the *dar-mokararis* Mr. Liebert and Mr. Lamb. But as was admitted during the course of the argument, evidence of actual improvements is not relevant to the issue before us. We are not here concerned with a question of estoppel, but of the intention of the parties to be gathered from the terms of the leases. Is the clause as to these improvements of such a character as to justify the inference that the lease conveyed a permanent interest? In my opinion the answer is in the negative. The fact that in a few cases extensive improvements were undertaken is probably due to the fact that the sub-lessees considered that by reason of the judicial decisions they had acquired a permanent interest in the land.

This is the only clause in the lease which can be relied on to directly favour the defendants' case. On the other hand there are clauses which are said to negative it. There is a provision against transfer which has been sought to be explained as an attempt to guard the tenure against getting into the hands of undesirable tenants and especially against transfer of parcels of lands within the village, and against the making of *dar mokararis* at inadequate rentals which could only be set aside by the troublesome and expensive process of annulling the *mokararis*. Then there is a provision that the lessees of these alleged absolute transfers were not to cut down any fruit-bearing trees and were to replant trees which had fallen down. This has been attempted to be explained by the allegation that prior to his leases the Raja had parted with his rights in the trees. This is, however, not so, for the lease in respect of trees and other products (Ext. X5) was in December, 1865, a year or so after the earliest of the leases. Further what was leased was the right of collecting rents, and if the rights in the trees had previously been disposed of it is not clear why the clause against tree-cutting was inserted in some leases and the grant of tree-rights made by others. For it has been pointed out that the leases may so far as this tree-cutting, etc., clause is concerned, be divided into four classes. There are leases amongst the 644, such as the one here reproduced, in which there are express provisions against trees-cutting; there is, secondly, a form in which the same provisions occur though the land is settled with *gach* (tree) rights; there is, thirdly, a form in which the clause does not occur; and, lastly, a form in which there is a special grant of woods and trees. On the other hand there is evidence that provisions for keeping boundaries

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intact, interfering with trees and restraint against alienation are to be found in perpetual leases. Again it is said that the presence of two names in the leases indicates that they were not permanent, two names being inserted in order that the lessees should have the benefit of two lives' duration. Of the 644 leases details have been given to us of 591. Of the latter, 49 leases only were in one name and the rest in two names, viz., 8 to a Hindu and Mahomedan, 28 to persons who are Hindus, but of different castes; 48 to persons of the same caste, but not otherwise related; 13 to husband and wife; 33 to two brothers; 18 to father and son. Why, moreover, it is asked should a lease be made to father and son if the leases were hereditary? There is doubtless something to be said on both sides as regards these contentions, but I do not propose to go into the matter further for this reason. I will, for the purposes of this judgment and without deciding the point, assume that the clauses mentioned and the grant to two lessees is not inconsistent with the supposition of the grant of an hereditary interest. The only effect, however, of this is to remove an obstacle in the way of the defendants' case. The latter has then still to establish that an heritable interest was in fact given and that the terms of the lease are inconsistent with any other hypothesis.

Then, shortly stated, how does the defendants' case stand on this point? The argument of their counsel sought in effect to reopen the decision of the Judicial Committee and of this Court which followed it. We were asked to hold that the decisions were valid only for the particular facts there proved and that there is no binding decision on us that the words *mokarari istemrari* do not of themselves import perpetual hereditary interest. For this purpose we were referred to a large number of dictionaries and other books of reference to shew that these words do mean what the Judicial Committee have said they do not. In my opinion it is no longer open to us to go into this matter and to hold as we are asked to do that the words in question do of themselves and apart from any proved local usage import perpetuity. Therefore apart from proof of such usage, the words *mokarari istemrari* do not help the defendant. There are no other words expressly or by inference granting hereditary interest. The clause as regards improvements is (to take a view the most favourable to the defendants), consistent with either case. And the same may for the purposes of this decision be assumed as regards the other clauses. The learned Judge has held that the leases should be construed most strongly against the grantor. If the words *mokarari istemrari* have, as he holds, a definite local meaning in the sense of perpetual, then the lessor used a clear term granting heritable interest and there is no need for any presumption against him. But if they have not such meaning, and there is nothing in the lease which directly gives an heritable interest, a lease cannot be dealt with in the same way as a gift or -

the like in which the grantee may take absolutely, whether words of inheritance are used or not. Further it is to be observed that these are not ancient grants in which case the absence of words of inheritance may be made good by proof of descent of the tenure, and in this case the learned Judge has found that the *zamindar* did not recognize the heirs of deceased grantees. It is quite clear, therefore, that if we had before us nothing but the fact that the original grantees were dead and the terms of the leases our decision must be in favour of the appellant. It is therefore for the respondent to show that by reason of admissible facts *dehors* the leases they do grant permanent heritable interests. They attempt to do this by proof of the allegation that, whatever may be the general meaning of the words *mokarari istemrari* as construed by the Judicial Committee and recent decisions of this Court, they have a special meaning in Hazaribagh where they are *per se* alleged to import permanency and heritable interest. The real issue therefore in this case is whether this allegation, the burden of proof of which lies on the defendants, has been established by them. For we must, I think, take it to be settled law that the terms *mokarari istemrari* do not of themselves necessarily import perpetuity. It is for the defendants to make out that by reason of other facts they do so in this case. If he does not, the appeal must succeed.

The main fact upon which the defendant relies is the existence of an alleged special customary meaning given to these terms in Hazaribagh. The learned Judge has expressed the opinion that it was common ground that there was a local meaning and that the dispute between the parties was merely what that meaning was. But in so holding, he was, I think, in error. It is to be noted that the issue in the form it now exists is raised in this case for the first time namely, that words ambiguous in themselves have a definite well-known meaning peculiar to Hazaribagh as importing an hereditary interest. The learned Judge has held that though the etymological meaning is ambiguous, the words have a definite meaning in the Hazaribagh district which was known to the parties when the transactions were entered into. It is necessary in this important matter to shortly review the pleading in the previous suits. In the suit of 1871 by Maharam Prem Koeri, the judgment states that plaintiff relied on the terms of the deed only and the Court decided the case on judicial precedent. The defendants also appear to have relied on the terms of the document only and not on any customary meaning. The defendants brought witnesses, but did not examine them. It appears from the judgment of the High Court in *Amir Khan's Case* (1) in 1877 (the case itself being instituted in 1875) that no allegation was made or evidence was given to show that the words *istemrari*

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mokarari had a meaning in the particular, or in the locality, different from that which they ordinarily bear. The judgment of the Deputy Commissioner is important; from this it appears that it was contended that the intention of the parties was to be gathered from the wording of the *pattas*. The Judge there stated that there was nothing to assist the Court, as until 1921-2 (1864-1865) such leases as this one then in dispute had never been given in that part of the country. He therefore based his decision on judicial precedent. By this statement it must not be understood that there were no *mokarari istemrari* leases giving hereditary right, for the plaintiff has produced in this case a number of *mokarari* leases granted by others between 1859-1870, in which express terms of inheritance are inserted. From the judgment of the Judicial Commissioner it appears that the defendants' argument was that the words *mokarari istemrari* were alone and by themselves sufficient to prove the hereditary nature of the grant, not that custom or usage gave them any special meaning.

In the suit of Narsiagh Singh (1901), the plaint (section 7) says that according to the usage in the plaintiff's zamindari and in the district of Hazaribagh *mokarari pattas* which did not contain express words of inheritance such as *nashan bad nashan* were considered mere life interests. This contention as to the necessity for words giving hereditary interest was also raised in the plaint in *Amir Khan's* case. The written statement in section 5 refers "to the phraseology prevailing at the time", and section 9 says that the words in question were never understood to convey any other meaning in the District of Hazaribagh. Paragraph 15 of the written statement denies the plaintiff's allegation of usage. The issue in that suit was "What would be the effect of the leases having regard to any local usage?" The Court held that the question of custom and usage did not properly arise that though the plaintiff had used the word custom, the facts related were not "extraordinary things or inconsistent with ordinary practice," and that the issue was only retained as a corollary to the first issue. Nor does it appear from the appeal to the High Court (1) that the case was argued on the basis of a local meaning, though at page 886, Banerjee J. did throw out that whilst the words in question did not in themselves imply succession they might have acquired a local or special meaning in the locality, a remark which it is suggested, prompted the taking of this defence in this suit.

In *Gridhari Singh's Case* (2) the argument proceeded independently of any customary meaning to be attached to these words. What was alleged and denied was an alleged practice to insert in leases words of inheritance in order to create a permanent tenure. These observations apply both to the first judgment and that of the High Court in appeal.

In the present suit, in the plaint there is no reference to customary meaning, nor it is likely that the plaintiff would assume the burden of proving this, seeing that they had succeeded in the two previous suits. The third paragraph of the written statement, however, does for the first time expressly state that the terms *istemrari mokarari* have obtained a customary meaning in the district of Hazaribagh viz., that it is used whenever the lease is intended to be of a permanent and hereditary character.

Upon this review of the previous litigation, I think that the statement of the learned Judge that it was common ground, and had been so all along, that the words in question bore a customary meaning in Hazaribagh is incorrect. At the most there was an allegation by the plaintiff in the earlier suits that there was a practice of inserting express words of inheritance when a permanent tenure was granted. It was also alleged that where this was not done it was understood that mere life interests were given. But it is one thing to allege what was understood at Hazaribagh and possibly elsewhere and another to allege as is here done that there is a local special customary meaning in that district. In my opinion the Subordinate Judge was right in holding in *Narsingh Dyal's Case* (1) that no question of special customary meaning as opposed to general meaning according to judicial decisions then arose. It is not improbable that, as has been suggested, this defence which appears for the first time, was suggested by the observations of Banerjee J. in *Narsingh Dyal's Case* (1) that "the words *istemrari mokarari* do not imply succession but they may have acquired a local or special meaning in the locality." It is difficult to suppose that if the terms had a well-known local meaning that defence would not have been set up in previous suits instead of arguments based on judicial precedents as to the general meaning of words. It is not unlikely therefore that this case may have suggested itself to the defendants on the failure of the two previous suits in this Court, as a means of escape from those adverse decisions and that of the Judicial Committee on which they are based.

I have pointed out the adverse inference which arises against the defendants by reason of the lateness of the special plea now taken. I will now advert to some other matters of a general character before entering upon a consideration of the evidence brought in support of it. It is, in the first place, to be noted that when it is alleged as here that words have a special meaning in a locality, it is thereby importured that that meaning is one which is not the same as but different from the meaning generally attached to the words elsewhere than in the locality in question. Evidence

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therefore that in Hazaribagh the terms *istemrari mokarari* meant perpetual must be evidence establishing a definite local meaning prevalent in a defined area by local usage or custom. Evidence, even of persons living at Hazaribagh that they understood the words generally (that is in all places) to mean hereditable, is not admissible under the issue and is excluded by the judicial decisions to which I have referred. It is quite possible that some persons in Hazaribagh did attach this meaning to these terms. We know that that was the view of the Judges of the different Courts which decided Srimati Prem Koeri's suit, and *Amir Khan's Case* (1). But those decisions, and I think some of the oral evidence tendered proceeded on the ground that the meaning generally prevalent was that stated—not that the words had a special meaning in Hazaribagh district. Hazaribagh is not a country distinguished by historical, ethnographical or other natural characteristics. It is an artificial administrative division constituted in 1833. It has been contended that no customary meaning can be alleged in such an artificial territorial division. However this may be, it is doubtful whether such a local meaning different from that prevailing elsewhere, is likely to exist in such a locality. It is established that *mokarari istemrari* leases were first granted in Ramgarh in 1864 with the leases in question. Before that date there had been no absolute transfers in Ramgarh, the nearest approach to such transfer being *jaigirs* descendible in the male line. It is suggested that Raja Ram Nath got the notion that *mokarari istemrari* grants were perpetual by reason of the fact that a former Raja of Kharakdiha had taken refuge with one of his ancestors and in Kharakdiha there had been some *ghatwals* tenures, called *gadi*, *sands* and *labuliyaits* to which I later refer, in which the words *istemrari mokarari* occur and which are alleged to have been permanent grants, a matter with which I will later deal. That Ramgarh and Kharakdiha now form part of Hazaribagh is a matter of administrative arrangement. These *gadi* grants in the eighteenth century in Kharakdiha have been relied on to prove the existence of a special meaning in Ramgarh in 1864, some 80 years later. Lastly what we have to determine is not what may be the meaning attached to these words now but their alleged special meaning in 1864, when notwithstanding that such grants were made in the Ramgarh zamindari for the first time, they are alleged to have had a well-known local meaning.

Some oral evidence in this issue has been given by both sides. Some of it is to the effect that the deponents understood *mokarari istemrari* to mean perpetual tenure as D. W. 27, D. W. 30, D. W. 31, D. W. 33 and evidence of Gopeshwar Singh taken on commission; D. W. 27 stated in cross examination that he had never come across any *mokarari patta* before

Amir Khan's Case (1) and at that time :—" I came to settle the meaning of *mokarari istemrari*, and I find it to mean permanent and inheritable. From whom I settled the meaning I do not remember." He adds that when he purchased Gurudi in his son's name, he then for the first time came across the word in the *patta*, that was in 1900. D. W. 30, General Manager of the Court of Wards, states that he has been at Hazaribagh as such manager since 1896, though many years previous thereto he had been Head Clerk in an estate in the same district. He speaks of *mokarari* elsewhere as at Rauchi. He speaks also of two classes of *mokarari*, one like those in suit, and another class in which there are words "from which there could not be any doubt" as to the heritable and permanent character of the tenures such as *naslan bad naslan* and so forth. The existence of the latter class would tend to indicate that some at least thought that express words of inheritance were necessary. D. W. 31 has been in Hazaribagh a considerable number of years. He states that the first suggestion which he heard that the *mokararis* were not permanent was at the date of *Amir Khan's Case* (1) and that since 1884. The local bank has been lending money on security of *mokararis* but that the Raja did not accept rent from the transferees of the *mokararis*. He also speaks to the insertion of the express words of inheritance in some *mokararis*. D. W. 33 says that there have been frequent talks about the nature of the *mokarari* tenures. D. W. 34 says he has never come across the words in any documents but his own, nor did he enquire the meaning of the words from any one else, and so far as he remembers there was no dispute as to their meaning. The last of the abovementioned witnesses is Dewan of the Record Department of the Burdwan Raj, under which there are tenures which are described sometimes as *mokarari*, sometimes as *istemrari*, and sometimes as both. These are all he says of tenures in perpetuity. It does not appear that this part of his evidence is relevant, seeing that the Burdwan estates are not stated to be in Hazaribagh. Its inadmissibility for this purpose has been accepted on appeal, and has been relied on only in connection with other clauses in the lease to which I have referred. Some of this evidence is of doubtful admissibility and some of the alleged prevailing opinions as to the meaning of the term may be due to the result of the judicial decisions. Such as it is, the evidence shows that the witnesses thought that the words in question import perpetuity and not that the words have a special meaning in Hazaribagh different from that which prevails in other parts of the country. In any case it is quite insufficient of itself to establish a customary meaning of the words in question within a definite area. The plaintiff has called some evidence to show that the *mokarars* understood

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1915 that they were taking interests limited in duration to the life of the grantee or grantees. The learned Judge himself does not appear to lay any stress on the oral evidence given on either side, which he describes as of minor importance. Evidence is also given on behalf of the defendants to the effect that when the words *mokarari istemrari* were used "people hesitated and would not come forward" and that the Maharajah then stated that he was giving them *al aulad* (for ever), and that *al aulad* and *istemrari* signified the same thing (D. W. 15), and that lawyers were consulted as to the meaning of the terms to make the matter sure. (D. W. 16, D. W. 21, D. W. 37).

If the term had a well-known meaning in Hazaribagh, why did persons hesitate to accept the leases as alleged without express words of inheritance and why was it necessary to go and consult pleaders as to the general law on the subject? The learned Judge has disbelieved this story as I do though the fact that it was thought necessary to set it up weakens the case as to the existence of a well-understood local meaning.

The argument has mainly been directed to the circumstances existing before and at the execution of the leases, including their registration. Other documentary evidence which is said to establish a special meaning of the words *mokarari istemrari* and the subsequent conduct of the lessor and his successors, I will deal in the first instance with the documentary evidence on the question of the alleged meaning of the terms mentioned in the Hazaribagh district. The learned Subordinate Judge has laid great stress on certain documents which were considered in the previous case called Kharakdiha *Gadi Sanads* and *kabuliyaats*. These are grants containing the words *istemrari mokarari* made by Government between the years 1777—1782 to certain *tikatis* or *ghatwals* who were friendly to it and who under Raja Girbar Narain Deo assisted the English in the conquest of Ramgarh. These *ghatwals* held their tenures under the Raja. The learned Judge has held that the *mokarari istemrari* settlements by Government of the 26 *gadis* were all transferable, heritable and permanent grants at fixed rent and not for life. Some *mouza sanads* of the years 1789—1792 have been similarly so regarded. These were grants to farmers or *fijadaras* under Iqbal Ali Khan, who had also rendered assistance to the British, whose holdings were it is said converted into *mokarari* under the Governor General's orders. These documents, the learned Judge holds, show that the local meaning of the word *istemrari* in the district Hazaribagh so far back as the year 1780 was perpetual or permanent in respect to hereditary descent and that it was so used by the Government whatever might be its meaning elsewhere. It is an admitted fact that these tenures have never been resumed. For the appellant it is contended that, if it were not for limitation, they might in fact be resumed, and that the right of the holder to continue to

hold over is not due to the terms of the documents themselves, but the conduct of Government in permitting the tenures to pass to the heirs without any attempt at resumption.

Now it is to be noted in the first place that the granting of leases called *mokarari* appear from sections 133-140 of the Land Tenure Report of Hazaribagh (1876) Ext. C. K. to have been a novelty in Kharakdihia where the *gadi* *sawads* were granted. Then we have it from the Fifth Report of the East Indian Company that in 1772 it was determined that settlements were only to be granted for 5 years, that is till 1777. In 1778, 1779, 1780, the settlements were for one year only. What happened then until 1789 does not appear. But in 1789 the Decennial Settlement came into operation and was in 1793 superseded by the Permanent Settlement. In Mr. Shore's Minute of 1789, the question is raised whether the *mokararis* granted by former Collectors are to be held valid. It states "The revenue which they now pay has continued so long without alteration that each man considers his land held as a *mokarari* tenure. The *pattas* have continued from year to year." He recommended that they should be confirmed (sections 126-133). In, however, the proposed regulations it is said that the Collector considered the grants *mokarari* and "previous to a final decision upon the proposal of the Collector" (that it is to be remembered was in 1789) he was required to give information upon certain points, among others, whether the persons holding these *pattas* were *tiukdars* or farmers, from what period the *pattas* were granted and with what authority. The answer to the latter question does not appear in the record. It is, as stated, an admitted fact that the tenures were allowed to continue. How this came about is not clear. For the respondent it is of course contended that the tenure-holders were allowed to remain on the land because by the terms of their lease they had a permanent heritable tenure. For the appellants it is suggested that the *gadi* *tenures* were not interfered with because the Government were of opinion that they came within the purview of the Permanent Settlement notwithstanding the statement in the Land Tenure Report, section 126, that the *gadi* never came under the purview of the settlement, a contrary opinion having been expressed by the learned Judge who tried the suit against Narsingh. On the eighth day of hearing of the appeal, the learned pleader for the appellants tendered certain documents which are said to have been recently discovered bearing on this point. This is correspondence and Proceedings of Government between the 16th January, 1837, and the 19th July, 1862, in which the opinion is said to be expressed that the *gadi* *sawads* came under the Permanent Settlement. The correctness of this opinion is of course not evidence, but the fact that an opinion was entertained which led to certain consequences, namely that no resumption proceedings were taken, would be clearly relevant. As, however, the documents

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were produced at a late stage and were objected to we were not able to admit them. It may be a matter of doubt whether these *gadi sanads* would come within the Settlement. For assuming that the holders could be regarded as *talukdars*, it is not clear whether the grants were or purported to have been made under the previous regulations. The query in Mr. Shore's Minute as to the authority under which they were granted would indicate a contrary conclusion. At the most it may be said that it is possible that the Government did not interfere as it thought the matter concluded by the settlement, or it may be that as the *mokararidars* had been allowed to hold for a long time and as the grants were made under exceptional circumstances with a view to pacify the country the Government did not interfere. The learned Judge has adopted the view that the *gali* did not come under the settlement and yet are in fact permanent, which fact according to his view can only be explained on the assumption that the words *mokarari istemrari* in the documents themselves made the leases permanent, a supposed fact which is again relied on by him to establish the local meaning of these words in Kharakdiha. Though this is only a part of Hazaribagh, the fact has been held to indicate the local meaning in the whole district. He is also of the opinion that the *galis* would be permanent if not within the Permanent Settlement. As regards this, it may be observed with reference to sections 3 and 4 of Reg. II of 1819 and section 12 of Reg. III of 1828 that "if any grant does not convey in express terms an hereditary and perpetual interest no tenure created by such grant however designated shall be considered to be hereditary and perpetual." Even, however, if it be assumed the *gali* tenures are now in fact perpetual and that this perpetuity is not due to the action of the Permanent Settlement it does not necessarily follow that such permanency must be due to the use of the words *mokarari istemrari* and to the fact that the words locally meant perpetual. For, as above stated, this permanency may be due to their not having been resumed as a matter of favour by Government for over a century and by efflux of time.

It has, however, been argued for the appellants that the *sanads* and *kabuliylats* themselves shew that they were not meant to be permanent when first granted.

It is first contended that the grants were not permanent as is shown by the fact that in two instances two *sanads* were given and in all cases two *kabuliylats* were given in respect of each property. How it is asked could these new documents be executed if the original documents were as alleged perpetual. As regards *sanads* reliance is placed in Exts. 77, 78. The explanation offered is that the first was granted in respect of Garda by the military officers at the time of the military occupation, the other by the Collector subsequently, and moreover the rent was then reduced. The

second instance is that of Gadi Kharak, as regards which two *sanads* were granted in 1780 and again in 1782.

Then it is said as regards the grant of fresh *Labuliyaats* that *sanads* were granted in 1777, 1780 and 1782, but between 1780 and 1783 there was a dispute as regards them between Raja Girbir Narain Deo and the Government, which was not settled till 1791. Meanwhile in 1788, temporary *Labuliyaats* were taken in which the words *istemrari mokarari* do not appear and final *Labuliyaats* with those words were given in 1790. The same explanations are given as regards the *mouza sanads*.

Reliance is, on the other hand, placed on provisions in the *sanad* by which, under certain circumstances, the holder who is described as *mustagir* or *farmer* is liable to be ejected. It is pointed out also that the same property which had been granted to one person in supposed perpetuity was again granted at a different rent to third parties. Thus Gadi Doranda was granted to one Mungal Singh by a *patta mokarari istemrari* in 1780 at a rent of Rs. 901. In 1788, a *Labuliyat* in respect of the said *gadi* (without the use of the words *mokarari istemrari*) was taken from one Dayal Sing at a rent of Rs. 932. In 1790, another *Labuliyat* was taken from another person named Nawab Sing with respect to the same *gadi* at the same rent. Gadi Gandey was granted in 1777 to Drigbijay Sing by a *patta* with words *mokarari istemrari* at a rent of Rs. 83 odd. In 1789, a similar *patta* with respect to same *gadi* was granted to the same person at a rent of Rs. 47. In 1788, the same Drigbijay Sing executed a *Labuliyat* in favour of Government with respect to the same *gadi* without mention of the words *mokarari istemrari*, and again in 1790 the same person executed another *Labuliyat* with respect to the same *gadi* with the words mentioned. Thus there was a granting of fresh *pattas* and taking of fresh *Labuliyaats* from sometimes the same and sometimes from different individuals with regard to one and the same *gadi* though the words *mokarari istemrari* were used in the fresh *pattas* granted. If it is argued that the *mokarari* above mentioned to Mungal Sing meant a perpetual lease at a fixed rent, how could a *Labuliyat* in 1788 be taken from another person, viz., Dayal Singh at an increased rent, and then two years later another *Labuliyat* from Nawab Sing? It is further pointed out that the *pattas* were generally of the years 1777 and 1780 and 1782 and the *Labuliyaats* of 1783 and 1790 : that the *Labuliyaats* of 1783 were all for one year only, the words *mokarari istemrari* being omitted, though the *gallis* which were the subject matter of their *Labuliyaats* had been granted in *mokarari istemrari* in 1777, 1780 and 1782. There are a number of *pattas* of 1780 and some *mouza pattas* of 1782, which though described as *mokarari istemrari* have an endorsement of the Collector, Mr Chapman to the effect that they were for the year 1189 Fasli. Again in some cases a *mokarari* was expressly renewed. In the *pattas* the

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mokararidars who are described as *mustagirs* or farmers are declared liable to ejection in certain cases. It is argued with force on these facts that they are inconsistent with the contention that these *mokarari istemrari* leases in *pargana* Kharakdha meant a perpetual lease at a fixed rent, for if so the repetition of *pattas* and *kabuliylats* with respect to the same *girdis* and the subsequent taking of *kabuliylats* in 1788 for one year without the use of the words *mokarari istemrari* would not have been possible. Nor can a perpetual lease be described as one for one year or be renewed for a year. No doubt it has been argued and the learned Judge has so found that these apparent anomalies were due to the fact that the grants to the *thikais* were in a state of suspense owing to the complaint of Raja Girbar Narain to the Government, a matter which it is alleged was not decided till 1790. This explanation, however, does not appear to me to have been made out on the evidence. The facts already mentioned show that it was not at that time the policy of Government to grant perpetual leases at a fixed rent, and assuming that what is alleged to have been permanent grant from the beginning could be in a state of suspense owing to objections having been taken by Raja Girbar Narain to the settlement of the lands with the *thikais* it is not made out why fresh *pattas* should be granted and *kabuliylats* taken. The original *pattas* might have been allowed to remain subject to confirmation on the rejecting of the Raja's objections. The evidence offered in connection with these leases is in my opinion far too uncertain for us to give the effect to it which the respondent in this and in the preceding unsuccessful litigation has asked the Court to do.

It seems to me impossible to say that these leases have not been resumed by Government because they were and were originally intended to be perpetual by the use of the words *mokarari istemrari*. It may well be that the grants were not resumed for the other reasons which have been submitted by the appellants. Moreover, the evidence seems to me to be somewhat remote. We are asked to say that because in the eighteenth century, under the very peculiar circumstances mentioned, some *ghatculi sanads* which were service grants were made in *pargana* Kharakdha, therefore some 80 years later when *mokarari istemrari* leases were granted for the first time in Ramgarh the Raja of Ramgarh and his lessees understood that these leases, which were a novelty in the zaminulari, were according to a well-known local usage permanent and heritable.

What the learned Judge calls the conduct of the outside public has also been relied on for the defendant as showing the meaning attached in Hazaribagh to the words *istemrari mokarari*. This consists of evidence of sales, mortgages and the like in respect of these *mokararis* which are said to indicate the general opinion that the leases were perpetual. The mere fact, however, that assignments took place would not indicate this. It

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would be necessary to show the amount of the money paid or other circumstances indicating the nature of the interest assigned. It is not disputed that a large number of transfers took place, but it is contended that these were the effect of the decisions in *Prem Koer's case* and *Amir Khan's case* (1), establishing that under the general law the words *istemrari mokarari* by themselves import perpetuity. The learned Judge says that though he could not ignore altogether the effect of the list of these cases in influencing public opinion and conduct, the latter was not wholly due to this cause, as 17 transfers took place before *Amir Khan's Case* (1). It must, however, be noted that all these transfers, except two, were after the suit of *Prem Koer* which established the permanency of these leases and which may therefore have encouraged these transfers. Of the two prior transfers, one was a sale and the other a *dir-mokarari*. The latter expressly states that it is to last "up to the term our patta remains in force," and in the former there is no statement of permanency of interest or the amount of the assets on which the sale price was based as an indication that a permanent interest was bought and sold.

Further, it is noteworthy that the transfer of the *mokararis* which took place before and after the decision in *Amir Khan's Case* (1) would appear to show that prior to that decision the *mokararidars* did not themselves appear to have been certain (to say the least) that they had heritable interests. In Ext. J., dated 16th February, 1870, the executant *mokararidar* says that his transferee "will remain in posession so long as the *mokarari istemrari* lasts." Similarly in Ext. Bb the words are "until our patta remains in force." In none of the transfers are there the words *naslan bal naslan* or *al-aualad* and the like with the exception of two only out of 18 transfers in which there is a reference to heirs (Ext. Aa), and *ba farzandan* (Ext. Ho). On the other hand, after it had been decided in *Amir Khan's Case* (1) that the terms *mokarari istemrari* meant perpetual we find out of 13 transfers 11 referring to the permanency of the grant either by the words *doams* (Ext. Cx), heirs (Ext. Ag), descendible to progeny, generation after generation (Exts. Gv, Y 2, Y 3, Cy, Da, Hg, Hi, Cu, Db). Similarly in the case of 21 sales after that decision we find in 11 cases references to heirs, hereditary right and absolute proprietorship. Similarly in the case of a mortgage (Ext. P) the nature of the right mortgaged is described as *hal dareams* (right in perpetuity).

It is answered that these words importing perpetuity in the transfers were inserted because the Raji had attempted in *Amir Khan's Case* (1) to recover possession on the ground that the leases were not permanent, and words showing hereditary interest were inserted by way of precaution.

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If, however, the local meaning of these words was as well-known and had moreover been affirmed by the Court in *Amir Khan's case* (1), it is not clear why it was thought necessary after that decision to expressly affirm the hereditary character of the grants. Further it is to be noted that though Srinati Prem Koeri also unsuccessfully attempted to resume, we find that only in two of the transfers after the date of her suit was any mention of hereditary right made, and before her suit the transfer was declared to be good only as long as the *mokarari* or grantor's interest lasted.

On the other hand the plaintiff strongly relies on some *pattas*, 23 in number, granted between the years 1859 to 1878, and two *doami* (perpetual) *pattas* in favour of Government. The first states that a *mokarari istemrari patta* is granted, but in order to make it perpetual, contained express terms of inheritance, *al-aulad* (descendants), *naslan bad naslan* (generation after generation) and the like. It is argued that the existence of these words of inheritance in these *pattas* and their absence in the leases in suits show that the latter were for the lives of the grantees only and that in Hazaribagh, when it was intended to grant a perpetual lease words of inheritance were used. The learned Judge dismisses this evidence on the ground that *istemrari mokarari* meant perpetual in this district and therefore the words of inheritance were redundant. But this is the issue to be decided and in deciding it we must take into account the wording of these leases, which certainly, so far as they go show that the words *istemrari mokarari* by themselves were not understood to import heritable interests in Hazaribagh. The *doami pattas* are relied on to show that when these *pattas* were executed in favour of Government with the intention of granting a perpetual interest the grantors did not use the term *istemrari mokarari* as they might have done if those words imported perpetuity, but expressly used the word perpetual.

A very important piece of evidence is that in which a *mokarari istemrari patta* was converted into an *al-aulad patta* on payment of premium and increase of rent. On 26th February, 1866, by Ext. 22, an *istemrari mokarari patta* was granted to Karu Mahato and Dhriti Mahato at an annual jami of Rs. 17—and yet we find that on 5th March, 1878, (Ext. 24), an *al-aulad patta* of the same land was granted to the same persons on payment of a premium (*nazarina*) of Rs. 125 or over 7 times the original yearly rental and a covenant to pay an increased rental of Rs. 18. The learned Judge disposes of this evidence by saying that it only shows that the parties wanted to make doubly sure the nature of the grant which was permanent, and no cover Ext. 24 was, he says,

(1) (1877) A. A. D. 533 of 1876, decided 4th Sept.

after *Amir Khan's Case* (1), and one of the original grantees Dhikat was still living. These observations are open to the same criticism. It is not clear what the learned Judge meant by the latter remark, but as regards the former it appears irrelevant. For *Amir Khan's Case* (1) decided that *mokarari istemrari* meant permanent. Why then should the lessee pay so large a *salami* and increased rental when according to that decision he had all by the previous lease which was expressly given to him under the latter?

It is then pointed out by the appellant that several persons who had *mokarari istemrari* from one grantor had at the same time *al-awad patta* from others. Thus Bakshi Basant Lal, who received a *mokarari* in 1922, took in company with another *al-awad patta* from a third party in 1917 with the terms *naslan bad naslan* (Exts. 32, 33). Similar instances are afforded by Ext. 10, Ext. 6, in 1865 and 1864; Ext. 88 in 1873 and Ext. 257; Ext. 26 in 1866 (with the very full description *mokarari istemrari ba-fur-zandan, naslan bad naslan batanan bad batanan waizar ofurzand*, that is *mokarari istemrars* descending to progeny, generation after generation, both in the male and female lines) and Ext. 29, a *mokarari* in favour of one of the same grantees. This again is relied on to show that *mokarari* does not import perpetuity, it being further pointed out that two of such cases were those of defendants. (See Ext. 35).

Reliance is further placed by the appellants on the difference in the terms of these two classes of documents, on the lessor parting with the whole of his rights on reservation of annual rent, and on the fact that the premium paid on all admittedly perpetual leases was mentioned in the lease and was large in amount ranging from 2½ to 266 times the amount of the rental.

Thus in Ext. 35 executed in 1868 (a permanent lease), the rental was Rs. 3 and the *naazarana* Rs. 800. This was the highest premium paid, but others are considerable. On the other hand it is pointed out that the leases in suit do not mention the *naazarana* which was in fact only one year's rent, even though as much as that was paid as premium for previous leases which ran for 5 years. Admittedly permanent leases show the *naazarana* on their face, and the explanation offered by the respondents of this circumstance is that the *naazarana* was not inserted to escape stamp duty. The appellant also relies on a document of Suniti Prem Keer executed in 1869 in which the word *al aeadî* is used. In my opinion the documentary evidence is insufficient to establish that the words *istemrari mokarari* imported perpetuity and heritable interest in Illecibagh, and on the contrary so far as it goes it favours the conclusion that these

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words did not of themselves have this meaning, but that when it was intended to give permanent rights words appropriate to that intention were expressly inserted.

I now pass to the incidents attending registration on which a great deal of stress is laid by the respondents. This piece of evidence is described by the learned Judge as new, that is not offered in the previous trials, though it is said that some of the documents on which it is based were in evidence in *Narsingh Dyal's Case* (1). All these 644 leases were registered under Act 16 of 1864 (See sections 28-30, 55-56). Under the Act, the document was required to be presented by both parties (sec. 28), and the Registrar had then to ascertain if the instrument had been executed, the right of persons to appear as heirs, assigns, etc., and the authority of the agent presenting, where an agent appeared. Under section 56, two registers were kept, viz., one of absolute transfers of immoveable property and the second of other transfers. The Act, as above stated, only required the Registrar to make the enquiries above mentioned. The Sub-Registrar (D. W. 45) says that he and his clerk ask the parties as to the nature of the document offered for registration. He admits, however, that it is the officer's duty to examine the documents and, there is no duty cast upon the parties to do so. Though there is some evidence that the Registrar did not ask questions, it may well be that in practice Registration Officers save themselves trouble by asking the parties the nature of the document which they wish to be registered.

Now it is shown that the leases in suit are registered in Book I, and on the back of two of the documents (A 1 and 214) against the words *istemrari mokarari* in Urdu is the English translation "Perpetual lease." On this the learned Judge finds that one of two things must have happened. Either he says the Raja or his men stated to the Registrar that the leases were perpetual, in which case there is an admission of their perpetual nature, or if that was not so the entry is evidence of the opinion of the Registrar and his officers as to the special meaning of the words *istemrari mokarari* in Hazaribagh and the nature of the lease.

Before us the circumstances attending registration are relied upon on two further grounds, viz., estoppel and, as part of the transaction, or *res gestae* to which we may look for the purpose of ascertaining the intention of the parties.

I will deal first with the latter contention which appears to have the support of some judicial opinion. The difference between evidence on an issue of estoppel and as showing the intention of the parties, executants of a document must be kept in view. In the case of *Najibulla Mul'a v. Nasir*

Mistri (1) it was said of the land there in suit that, as it was registered in Book 4, which did not relate to immoveable property, this fact "showed what the intention of the parties was when the instrument was registered." This view that the form of registration was evidence of intention was adopted also in *Jagatshar Narain Prasad v. Brown* (2) in which the last case was cited. There is also an observation of Harrington J., one of the Judges who decided *Indra Bibi v. Jain Sirdar Ahirs* (3) to the same effect. In all these cases the expression of opinion was *obiter dictum* and had this not been so I should have considered it necessary to refer the matter to a Full Bench. It was considered to be doubtfully correct in *Ramsidh Pande v. Balgobind* (4), where the Court said "If we are entitled, on this question, of intention, to take into consideration the manner in which the bond was registered," referring to the previous decision of this Court above noted. The other cases to which the respondent has referred us are not relevant. In *Parasharampant Sudashirpant v. Ilama* (5) the question was whether there had been proper registration as was the case in *Baij Ndh Teucari v. Sheo Sahoy Bhagu* (6). In *Indra Bibi v. Jain Sirdar* (3), already quoted, it was held that the document did not create a charge and if it did, it was not properly registered. In *Narasamma v. Subbarayudu* (7) bond *fide* purchasers were misled by the form of the registration. As I have already pointed out, there may well be an estoppel in cases where a party registers his document, in a way which shows that it was not intended to affect immoveable property and others suffer loss thereby. In my opinion, however, the fact that a document is registered in one way rather than another is not evidence of intention of the executants. Nor strictly speaking have we, in cases of construction, to deal with intention. We have to see what the party has said and to ascertain the meaning of his words, and in my opinion that meaning must be ascertained from the document itself in connection with such admissible evidence as shows how the words used are related to existing facts and not by reference to the act of registration which subsequently takes place. It may be that the document is wrongly registered through error of the registering officer whose duty it is to register it. If it be alleged either that the party asked that it should be registered in a particular way or that not having done so he yet assents to the form of registration when he comes to know of it, the matter becomes one of admission, to which I next proceed. It is a well-known rule of evidence that a subsequent admission as to the true

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- (1) (1881) I. L. R. 7 Calc. 196. (4) (1886) I. L. R. 9 All. 158
 (2) (1906) I. L. R. 33 Calc 1133. (5) (1909) I. L. R. 34 Bom 202, 216.
 (3) (1907) I. L. R. 35 Calc. 845. (6) (1891) I. L. R. 18 Calc. 556
 (7) (1895) I. L. R. 18 Mad. 364.

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meaning of a deed or subsequent conduct of a party or to person claiming under a deed cannot, except where ancient documents are concerned, be received to aid the construction of the deed. See Norton on Deeds p. 138. If therefore it was shown that the lessor in this case expressly stated to the Registrar that the leases were perpetual and heritable and expressly asked that they should be so registered as perpetual transfers, or if having come to know later that they were so registered, acquiesced in such registration : these facts would not in my opinion be admissible evidence to construe the language of the lease. Nor in my opinion, even if any question of estoppel had been raised, is it established. There remains the fourth argument in this connection, namely, that as the Registrar registered the documents as perpetual leases, that was an expression of opinion by him as to the meaning of the words *istemrari mokarari* in Hazaribagh. I will not advert to the technical objections taken both as to admissibility and proof of this evidence. On the facts the inference does not follow. We know really very little as to what occurred at the registration. It appears to have been conducted on the Raja's side by his agents, some of whom were also *mokarari-lars*, though it is not suggested that they were guilty of any fraud in the matter. It does not appear, however, that they had any authority to admit anything, but what the Registration Act requires, and this does not include a description of the nature of the document as to which the Registrar had to satisfy himself. It is denied that the Registrar put any questions on this point. But supposing that he did, it is not suggested that they were put in English or answered in that language. If therefore he asked what the lease was, he must have been told that it was an *istemrari mokarari*, and this he translated as "Perpetual Lease" according to his own understanding of the words. And so we find on leases A r and 214, the signature of the Raja's agents, not against the words "perpetual lease" but against the vernacular *istemrari mokarari*, the signature of the agent being in the vernacular. But then it is said that if the Raja, the lessor, did not know of the facts at the time or if his agents had no authority to admit the leases to be perpetual yet the Raja must have come to know later that the Registering Officer had treated them as "perpetual leases" and he did not object. Whether he knew at the time is not shown, for if it be admitted that ordinarily documents are returned to the persons presenting them, it is also not unusual to give authority to the tenants to take out the *pattas* which would show registration in Book I. Of Exts. A r and 214 it is said one only recently came into the Raja's possession and the other was produced by the respondent. It is, however, shown that at least one *patta* with the words "registered in Book I" was returned to the Raja, and from this and other circumstances it is argued that as the Raja did not object and he was, it is

said, alive to his interests in these matters, that was an admission that the leases were what the Registrar took them to be. As above stated, if there had been any such admission it could not be evidence on the issue before us. But on the facts it is not clear that there was such an admission. For if the Raja understood that the leases had been registered as permanent, the question would still arise whether he understood by permanency a fixed and certain tenure for the lives of the grantees as opposed to the previous *tieca* grants or permanency in the strict sense of perpetuity, *viz.*, as descendible to all heirs. If he was spoken to about the matter at all, he must have been told that the leases were registered in Book I as *istemrari mokarari* leases. Apart from the question of admissibility, it seems to me on the facts that the evidence is of too scanty and uncertain a nature to admit of the conclusions being drawn from it, which the respondents suggest. Nextly, as to the Registrar's opinion. Apart from the question of proof and admissibility, the fact that he translated the words *mokarari istemrari* by "perpetual lease" does not prove that that was the special local meaning of these terms in Hazaribagh. That may have been his own opinion as to the general meaning of these words at Hazaribagh and elsewhere. That meaning has been long the subject of dispute; and others besides himself, such as the Deputy Commissioner who decided the cases referred to in Prem Koer and Amir Khan's, took that view of their meaning. It is certainly noteworthy in this connection that if the words did bear a special well known local meaning, their decisions were not based on this fact, but on judicial precedents which did not proceed on special local usage. Mr. Westland, the Registrar, may have also formed his conclusions on considerations quite independent of the special local usage alleged.

It may, however, be argued that, "even if evidence is inadmissible to prove directly the intention of the lessor, evidence is admissible to establish the special meaning of the words *istemrari mokarari* in district Hazaribagh, and that evidence showing that the lessor understood these words in a particular sense is evidence of such alleged local meaning." In the first place on the facts it would have to be shown not merely that the Raja, the lessor, did understand by the word, *istemrari mokarari*, a permanent, heritable interest, but that he did so because that was the local meaning of these words. But as each finding on this case may re-act upon and depend upon others, to hold this, we should have to hold that the other evidence in the case pointed to the existence of a special local meaning. But in my opinion it does not; and if that be so, the lessor could not have made any admission or done anything from which it could be inferred that there was a customary meaning as to the word in question. These *mokarari* leases were introduced by the Raja for the first time in his estate. At the time the

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leases were granted, the law was that, the word *mokarart istemrari* did not import heritable interests without further words to that effect. Except the *gadi sanads* and *labuliyaats* dealt with already, no documents are produced which are relied upon to show that the words mentioned were understood otherwise in Hazaribagh district, and, as the learned Judge has himself held, the oral evidence is of no account. So far from the words having then acquired a well-known special meaning, the oral evidence tendered by the defendants that they objected to the leases on the ground that they contained no words of inheritance, the documentary evidence such as the *al aulad* leases to which I have referred, the fact that previous judicial decision favourable to the lessees did not proceed upon the existence of any such local meaning as alleged, and the fact that notwithstanding repeated controversy this allegation of customary meaning was not set up till the present suit, negative the existence in 1864 of any such special meaning as is alleged and if the words had no defined local meaning in 1864, any statement of the Raja which we are asked to infer from his conduct must, even if made out (which I am not prepared to hold) be, in fact, referrible to the lessor's own notions as to the meaning of the words he used rather than to any knowledge and admission on his part of a special customary meaning in the district of Hazaribagh.

The conclusion therefore at which I arrive is that the respondents have failed to prove this issue relating to the existence of a special local meaning at Hazaribagh, an issue which was not raised in previous litigations and which in my opinion is an after-thought designed to meet the difficulties created by the adverse judicial precedents to which I have referred.

The last matter for consideration is certain other circumstances which are alleged to support and rebut the defendant's case and which may be conveniently dealt with together. The chief matters relied on in this connection are the circumstances under which the leases were executed, and the subsequent conduct of the parties.

As has been pointed out by the learned Judge, according to the decisions of the Sudder Dewani in the period 1848-1860, it was held that the words *istemrari mokarari* did not import an heritable interest without additional words of inheritance. It was while the law was in this state that the first lot of leases were executed in 1864, commencing from the 27th November of that year. These were followed by a few more in 1865 and the largest number in 1866, the last of these being on 22nd September, 1866. In 1864 the *ghatwali* case *Manrunjun Singh v. Lalnund Singh* (1) had been dismissed by the first Court. In appeal to the High Court on the 17th June, 1865, and therefore after the first lot of leases, it was held that the word

istemrari imported an hereditary interest, a view which was not accepted by the Privy Council in 1873 to which the case went in appeal (1), though it affirmed the decision of the High Court on the ground that, though it was doubtful whether the words *istemrari mokarari* imported an hereditary interest, still coupling those words with the usage proved, tenures which were *ghatical* (to which I may observe other consideration applied), were hereditary. The case of *Mst Lalu Koer v. Rij Hari Krishna Singh* (2) which decided that the words *istemrari mokarari* contained in a *patta* in themselves conveyed an hereditary right in perpetuity was decided in 1869, after all the leases in question had been granted, and was followed within three years by the resumption suit of Maharani Prem Koeri, to which reference is later made. If therefore any inference is to be drawn from the state of the law as it existed at the date of the execution of the first of *mokararis* which the latter ones substantially reproduce, it would be one favourable to the plaintiff. The learned Judge is, however, of opinion that neither of the parties were influenced by a knowledge of the state of the law on the point and did not enter into the transactions in suit either in view of the previous decisions of the Sudder Dewan, holding that the word *istemrari* did not import hereditary interest or the *ghatical* case in the year 1865 when the contrary was held for the first time. It is, however, not improbable that those who were responsible for the draft lease may have known that, according to judicial precedent, the words *istemrari mokarari* which were then used in the Ramgarh zamindari for the first time did not import heritable interest. On the other hand there is some evidence that the Raja himself was not aware of these decisions. However this may be, it is clear that the state of the law on the subject, when the leases were first granted, does not assist the defendant. The alleged oral conversations on the subject of the leases, whether as given by the plaintiff or defendants' witnesses are not believed by the Judge and have not been relied upon for the respondent. As I have already said, the fact the latter thought it necessary to set up this case militates against the existence of a well-known customary meaning of the words *istemrari mokarari* at Hazaribagh. The circumstances attending the next step, viz., registration, I have already dealt with, as also the condition of the zamindari at the time and the increase of the rental and taking of the *salami* and the omission of mention of the latter in the leases in suit, though both the fact that *salami* was given its amount (which was sometimes very large), were set forth in the admittedly *ai-aulad* leases. This fact, as also the mention of the terms of inheritance in the admittedly permanent leases, the fact that some of the

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grantees of the *al-aulad patta* subsequently took *mokararis* from the Raja tell against the defendants' case. If *mokarari istemrari* in Hazaribagh meant of themselves heritable interests, what was the necessity of the other words of inheritance? If they did not, why did not the lessees who held *al-aulad* leases accept mere *mokararis* without words of inheritance, if it was understood that the Raja was granting an heritable right?

The lessor died in 1866. So no question of his conduct arises in the case. There appears, however, to have been early dealings with the leases, for we find in Ext. D, a purchase on the 30th July, 1867, and a sale again in 1872. As I have stated, there is no doubt that a large number of alienations by the *mokararedars* have taken place and I think it must be held that in a large number of cases both parties, in such transactions, thought that they were dealing with permanent heritable interests. As Mr. Chakravarti points out there is evidence that as time went on the value of the properties generally increased instead of diminishing as they would do, if it was supposed they were for a diminishing term. We also find that some of the properties were sold from 59, 40, 35 to 16 $\frac{1}{2}$ years' purchase. I have, however, already pointed out that this belief in the permanent character of the grants was due I think to the judicial precedent to that effect and not, in my opinion, to the general knowledge of a customary meaning of the terms *istemrari*, *mokarari* in Hazaribagh. Some reliance is placed by the respondents on the fact that Srimati Prem Koeri, in 1871 brought a suit to resume one of these leases and that the claim to resumption was based on the failure of the male line of the last holder. It is, in the first place, argued that any admission by the tenant for life was not binding and did not affect the reversioner, and I think this is so. On the facts, however, the learned Judge finds that as a lady she knew little about the matter and as *mokararis*, were a new form of lease in the estate she probably thought that a *jaigir* had been created. She apparently did so, judging from her plaint. But this fact does not assist the defendant, for her claim to resume shows that she did not regard the leases as permanent in the sense claimed by them. In this connection I may deal with the learned Judge's argument that the leases were permanent, because the Raja gave his sanction to such as were granted by female members of the family. It seems clear that if the lessees were to be given estates for their lives, that estate could only be guaranteed to them by the assent of the reversioner. For it might well be that the life-tenant might die and her interest be put an end to during the life of the lessee. The fact that Srimati Prem Koeri instituted a suit for resumption also weakens the argument that Raja Nan Narain, who was a stranger to the grant of these leases, instituted Amir Khan's case, through disappointment at finding that a large part of the estate had been permanently alienated by his

predecessor and that therefore that suit was not a genuine challenge of the permanent character of these leases but an attempt by one who well knew that they were permanent to get a declaration to the contrary. Then it is said that the *Hakima Jaidid* shows that the leases were permanent. The former were properties from the income of which the revenue and other demands were met. The learned Judge thinks that as the revenue was a permanent obligation therefore the properties set apart for its payment (including the *mokararis* in suit) must have been permanent. But this does not follow. Moreover, we find *ticeas*, *khairats* and *jaigir* in the list. Some reliance may be placed on the fact that no Death Register of the *mokararidars* appears to have been kept : though on the other hand it may be argued that the tenants did not apply to get themselves registered in the zamindar's *sherista*. The main question on this part of the case is—did the lessor or his successors ever recognise the heritable character of the leases by recognising heirs as tenants, accepting rent from them and so forth? The learned Judge has found that he did not and in this I agree with him. It appears to be clear that from the time of *Amir Khan's Case* (1) the Rajas have all along been maintaining that these leases are not hereditary notwithstanding adverse judicial decisions to which they had temporarily to bow. When, however, owing to the decision of Judicial Committee this Court took a different view of the meaning of the words *istemrari mokarari* and the leases in suit, then the Raja was again able to effectively challenge, and has challenged their permanency. In the case, however, of appeal No 96 of 1910, it is necessary to go into this question in detail, because it is alleged that in this case at least recognition was established. The original *mokararidars* were a man named Khushlal, and his disciple Rup Das. The latter died, according to the plaintiff, in 1882, though the respondent contends it was sometime before 1880. It is then alleged that the Raja recognised as *mokaridar* an heir of this man and as the heir is still living, the property cannot in any event be resumed till his death. The person, however, who is said to have been recognised by Sarup Das was not an heir of, but a co-disciple of Rup Das. For the spiritual father would succeed to Rup Das and not a brother *chela*. It is then said that as the holders of the property were recognised as tenants, they cannot be ejected without notice. It is admitted that if they are tenants notice is necessary. The question, however, is whether there has been recognition of Sarup Das or the present holders as tenants. The lease would in any case last till the death of Khushlal which was in 1896-97, and no recognition of Sarup even if it took place before the death of Khushlal would affect the plaintiff. Reliance, however, for the respondent

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is placed on receipts granted by the *mokararidars* and on receipts which are said to have been granted after the death of Khushi Lal by the Raja's mortgagee Jadu Nath Mukerji. The Raja is obviously not concerned with the acts of his *mokararidars*. It seems also plain that what the Raja's mortgagee did in this matter would not bind him, and further there is an express provision in the mortgage which, it is to be noted, was before the death of Khushi Lal, that the mortgagee to whom the rents were mortgaged was not to take rent from the heirs of the *mokararidars*. If therefore the mortgagee's receipts bear the name of Sarup Das, it was in direct contravention of the instructions of the mortgagor, which the son of the mortgagee admits, and were as I think inserted by mistake, for we find that the mortgagee gave a *hu umnama* (Ext. n) to Mohant Khushi Lal on the 16th August, though admittedly he had been then dead some 3 or 4 years. Reliance is also placed in a road cess return (Ext. f) which could not admittedly have been filed before 1899, in which the Raja is said to have recognised both Khushi Lal and Sarup as tenants, though the former had long been dead. This shows also that the Raja was unaware of Khushi Lal's death. Again we find in Ext. A 2, a rent receipt, dated 27th October, 1880, to Khushi Lal and Sarup Das, though if Rup Das did not die till 1892, the latter had not succeeded the former. There was evidently some mistake of which advantage is sought to be taken. For the appellant it is suggested that the fact that Sarup's name appears on some papers is due either to inadvertence or more possibly a mistake arising out of the fact that the final S in the name of Khushi Lal Das was transferred to the word Rup Das, which followed it making the latter Sarup Das. However this may be, the Raja cannot be held to have recognised the alleged heir or their tenants unless he was aware of the facts and the holding over was with his express consent. This is not shown, nor is it likely that the lessors who have persistently refused to recognise any heirs of *mokararidars* should have done so in this case were the person alleged to have been treated as tenant was not even an heir. Sarup Das has himself disclaimed interest, though he may not be a satisfactory witness. His evidence is attacked on the grounds amongst others that in 1881, 1909 and 1902 he signed certain documents (In 1, In 2, and Io 1, Io 21). It is not certain what the documents were about which he was cross-examined, but it is clear he was not cross-examined so as to show why it is that his name appears in the papers on which the respondent relies.

In my opinion the respondent in this appeal fails to make out any recognition. What he seeks to do is to take advantage of the fact that either through inadvertence or error Sarup's name appears to have crept into some of the papers, but that he or the present holders were ever knowingly recognised by the Raja as tenants I do not believe.

In my opinion, that part of the case which has been compendiously described as "Surroundings, circumstances and subsequent conduct" do not enable me to say that the leases were hereditary permanent interests.

In conclusion, I hold that the defendants have not established the existence of the special local meaning of the words *istemrari mokarari* alleged, that these words in the lease do not import a perpetual heritable interest *per se*, that there is nothing else in the lease or in the circumstances of the case from which such an interest is to be inferred. The case is (with one exception), similar to the previous decisions of this Court holding that permanent hereditary interests were not given by these leases. The only difference between the cases is that in the present suit a special local meaning of the words *istemrari mokarari* is for the first time pleaded and is sought to be supported not only by documents which were used in the previous cases but by evidence relating to the registration of the leases, which though it must have been as equally then available as it now is, put forward for the first time in this suit. The allegation involved in this third issue appears to me to be an after-thought, and in my opinion has not been made out; and as in my opinion the decision of the case practically turns on whether the defendants have established the alleged customary meaning of the words *istemrari mokarari* in Hazaribagh, I would therefore decree this suit and appeal with costs.

As there is a difference of opinion and there is therefore no majority concurring in a judgment varying or reversing the decree appealed from, that decree must be confirmed and the appeal dismissed with costs in Appeal No. 66 of 1910. This order, as the previous judgments, governs all the appeals, but only one hearing fee will be allowed.

Coxe J. I think that the decision of the Court below is right, and that the leases of 1864-66 were leases in perpetuity.

What we have to decide is what the parties meant in 1864 by the words *istemrari mokarari*. The meaning popularly attached to the word *istemrari* appears to me to be no longer in accordance with the interpretation of it by the Sudder Dewani Adalat. There is nothing contrary to experience in the supposition that in the course of years the meaning of a word may change, nor are we bound by any rule of law to hold that a term must always mean what it has once meant.

I certainly have the greatest respect for a point of this kind for the opinion of the Sudder Dewani Adalat. The Judges must have been well acquainted with the language of the districts and their opinions on the meaning of a term in common use in their time would be to me almost conclusive.

Four cases have been cited from these reports. The first is *Baboo*

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Toolee Nurain Sahee v. Baboo Modnarain Singh (1). This was decided by a single Judge, who quoted 4 precedents "among the many that might doubtless be produced" and held that it had been "repeatedly ruled that the permanence (*istemrari*) expressed in these pataas has reference only to the term of existence of the grantee." And the learned Judge observed that his own knowledge confirmed the correctness of this view. The case like several others, related to a maintenance grant by the Tikari Raj. I find it difficult to believe that, even then, the word "*istemrari*" was used to express a grant for life and that alone. Grants for maintenance to a dependent member of a family are often for life, and leases for service also are often, though by no means always, intended not to be hereditary. But the idea of the son succeeding to the father's position is so ingrained that I imagine that, even in 1848, the right of a son to inherit an *istemrari* tenure could have been questioned, but in very few cases and, indeed, in hardly any outside the classes of service tenures and grants for maintenance, though I fully admit that, on the comparatively rare occasions when a grant for life was given, the term "*istemrari*" was then employed.

The next case is *Mussi, Ameeroonissa Begum v. Maharaja Hetnarain Singh* (2). That too was a grant for maintenance and it was held that although "*istemrari*" means perpetual yet such grants "according to the usage of the country were personal to the grantee."

In the case of *Rajah Modnarain Singh v. Kartlall* (3) all the papers had been burnt and, in the absence of other evidence, the court felt itself bound by the precedents to hold that the grant was for life. The case of *Sarobur Singh v. Rajah Mehendernarain Singh* also (4) is based on precedents.

After 1860, the tide turned, and were it not for the decision in *Tulshi Pershad Singh v. Ramanarain Singh* (5) and the cases based on it, to which I will refer later, I doubt not that there would now be no question that an *istemrari* lease is a lease for ever. I should indeed be surprised to learn that, if now-a-days two persons, of ordinary education but unacquainted with the special rulings on the subject, were to enter into a bargain for the exchange of an *istemrari* lease and *tabuliyat*, it would occur to either of them that the lease was to be anything but perpetual.

The first case in which this view was taken was that of *Manrunjan Singh v. Rajah Lelanand Singh* (6). One of the Judges was Sir George

(1) (1848) S. D. A. 752 ;
10 I. D. (O.S.) 532.

(2) (1853) S. D. A. 648.

(3) (1859) S. D. A. 1572.

(4) (1860) S. D. A. 577.

(5) (1885) I. L. R. 12 Calc. 117 ;
L. R. 12 L. A. 205

(6) (1865) 3 W. R. 84 ; on review

(1866) 5 W. R. 101.

Campbell, whose knowledge of the country cannot be questioned. That was a case of a *ghateali* tenure and the suit was brought to eject the grantee's heirs, because the services were no longer required. It was decided that "*istemrari*" meant perpetual. The S. D. A. decisions were referred to but not followed. This decision was appealed to the P. C. and their Lordships held that the lease, coupled with the usage, showed the tenure to be hereditary, though they observed that it was doubtful, whether *istemrari* meant permanent for life or permanent for ever (1) In 1867 the P. C. case of *Baboo Dhunput Singh v. Gooman Singh* (2) was decided. That was a suit for enhancement of rent. It was held that a *patta* could not be assumed to convey an estate of inheritance without special words. But their Lordships remarked that if the tenure was *mokarari istemrari* there was an end of the case.

In *Musammut Lakhoo Kocar v. Roy Haro Krishna Sing* (3) it was held that *istemrari* meant for ever and the S. D. A. decisions were not followed.

In 1870 the decision in *Lakhoo Kocar's Case* (3) was followed in *Karu-nakar Mahati v. Niladhro Choudhry* (4) and it was held that the word *istemrari* showed the intention that the lease should be perpetual and if it were perpetual, the hereditary character would follow from it.

Then in 1875 was instituted *Amir Khan's case*, which was a suit to recover property covered by one of the *istemrari* leases now under consideration, on the death of the original lessors. The courts following the decision in *Lakhoo Kocar's Case* (3) held that the leases were perpetual. The decision of the court of first instance was given by Colonel Boddam who had a thorough knowledge of the district. In dealing with the supposition that the Raja might have intended to grant life leases, and that the tenants were deceived, he seems to have assumed as a matter of course that "the meaning of the term as generally understood" was perpetual, and implied that the leases would never be disturbed in that or in the following generations. And the Judicial Commissioner of Chota Nagpur seems also to have taken this for granted, as he says—"It is not impossible that the original grantor or his advisers contemplated the possibility of their limiting such grants to the lives of the heirs of the grantees. If so they overreached themselves, for it cannot be doubted that the grantees believed that they were purchasing a *mokarari istemrari* title."

On a question of this kind I think no authority could stand higher than

(1) (1873) 13 B. L. R. 124,

L. R. Sup Vol. 181.

(2) (1867) 11 Moo I. A. 433;

9 W. R. P. C. 3.

(3) (1869) 3 B. L. R. A. C 226;

12 W. R. 3

(4) (1870) 5 B. L. R. 652;

14 W. R. 107.

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that of Mr. Justice Field, and in paragraph 37 of chapter 7 of his Introduction to the Regulations, published in 1875, he defines *istemrari* tenures as tenures granted in perpetuity. And a great deal later, in the Tagore Law Lecture of 1893, Mr. Mitra, afterwards Mr. Justice Mitra, observes: "Tenures held at fixed rent and in perpetuity (*istemrari* or *mokarari* and *mourusi*) are in reality instances of alienations of land, subject only to payment by the alienses and all persons holding through them of fixed sums in perpetuity to the alienors, and those claiming under them." In both these last instances, I attach importance to the evident unconsciousness of the observation. Both the learned authors must have been perfectly familiar with the conflict of authority over this term. But when they employed it as a term in common use without reference to the rulings with regard to it, it evidently did not occur to them that it could mean anything but a perpetual tenure.

There is oral evidence in this case, which seems to me worthy of respect that the term is now understood as giving a permanent interest. Gopal Chandra Sen was in Government service in Hazaribagh from 1867 to 1896, and for a large portion of that time was connected with the Encumbered Estates Department. He says that throughout his experience he always understood the term *mokarari istemrari* to mean a permanent interest. He certainly is in a position to know the meaning of words in use in Hazaribagh and the fact that he is a director of the defendant bank does not deprive his evidence of all value. Still stronger evidence is that of Krishnachandra Ghosh, who fills the responsible post of Manager of the Court of Wards and Encumbered Estate, and seems to have no interest in this suit. It is impossible that he should not know how the term is generally understood in the district, and I can see no reason why he should be distrusted. Radhikaprasad Mallik was in Government service from 1855 to 1893, rising to the position of Head Clerk of the Deputy Commissioner's office. His position of course is not equal to that of Krishnachandra Ghosh, and he is a director of the defendant bank, but I do not regard his evidence as wholly negligible. Babu Gopeshwar Singh, Dewan of the Record Room of the Burdwan Raj, who seems entirely independent, says that in that Raj *istemrari* tenures are permanent, basing his opinion on the fact that even when there are no words of inheritance, they are never resumed.

Moreover, it is only to be expected that in the course of time the term should come to be regarded as meaning perpetual, even if at first it signified only a lease for life. Its original meaning is "continuing." Now a lease for life is a lease terminating on the occurrence of a very definite contingency. The unsuitability of this vague, indefinite and almost unmeaning term to denote such a lease must be apparent, unless it is conceded that that term, whether suitable or not, was always conventionally employed

to signify that particular kind of lease and no other. But this is by no means the case, leases for life being very unusual, while *istemrari* leases are as common as possible. Obviously therefore when any one wanted to create this unusual form of lease, he might reasonably be expected to prefer the use of words (of which there is no lack), which would signify what he wanted and thus the use of this word which hardly signifies anything in connection with a lease for life, would fall more and more into desuetude for that purpose. Again, as I have said, the idea of the son succeeding to the father's position is ingrained, and the cases in which the heirs of *istemrari* are recognized must be far in excess of those in which they are not recognized, and thus in the course of time the meaning of the term in its popular acceptation would naturally tend more and more to signify perpetuity. As an illustration I may quote paragraph 143 of the Tenure Report of Hazaribagh. Dealing with the neighbouring *pargana* of Kharakdih, the author says "of temporary leases there are 1,851. The custom of leasing out their villages is general throughout the *pargana*, but although the farmer has no permanent interest in his tenure, it frequently happens that a lease descends for generations in the same family, until the former becomes imbued with the idea that he has a legal right to hold the lease of the village. I am not sure that this idea is entirely erroneous". If then it is so common and easy for mere temporary leases to acquire the reputation of permanence, it can well be understood how naturally *istemrari* leases, which admittedly include some idea of permanence, come to acquire the meaning of leases in perpetuity.

The cases of *Shore v. Wilson* (1) and *Attorney-General v. Clapham* (2) seem to me authority for holding that evidence may be taken and examined in order to show what meaning was attached to a particular expression at a particular time. In the former case Parke J. observed "In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue, but it is also competent where technical words or peculiar terms, or indeed any expressions, are used which at the time the instrument was written, had acquired an appropriate meaning either generally or by local usage or amongst particular classes". And Tindal C. J. said "the true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much as an exception from, but as a corollary to, the

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general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agrees that by no other means can the language of the instrument be made to speak the real mind of the party."

In the case of *Attorney-General v. Clapham* (1) the case of *Shore v. Wilson* (2) was referred to in the following terms:—

"In that case parole evidence was necessary, in order to enable the Court rightly to understand the deed. Certain words were used which it was necessary to construe, and this could not be done without admitting a great deal of evidence as to the state of religious parties at the time when the deeds were framed. For such a purpose the evidence was most reasonable. It was like the evidence afforded by a dictionary, which enables us to translate a foreign language; or a book of science, which gives us the meaning of words of art."

I may refer also, in passing, to *Raghujirao Saheb v. Lakshminrao Saheb* (3)

"Such evidence can also, in my opinion, be brought within the terms of section 98 of the Evidence Act, which admits explanation of technical, local and provincial expressions and of words used in a peculiar sense." Now it may be conceded that, although both parties from time to time have pleaded that the meaning they respectively attach to the term *istemrati* is a local meaning, customary to Hazaribagh, yet it is now undisputed that the word bears the same meaning in Hazaribagh as elsewhere. I do not think, however, that the fact excludes all evidence of its meaning. The parties live in Hazaribagh. They need not be expected to have any opinion about the meaning the term bears elsewhere. They are, I think, entitled to say that at any rate in Hazaribagh, with which alone they are acquainted, the term bears such and such a meaning, and it seems unreasonable that such evidence should be shut out, because the change that has come over the meaning of the word in Hazaribagh has come over it elsewhere also. Or, to put the matter in another way, either the term itself signifies perpetuity, or it does not. If it does, there is an end of the case. If it does not, then the fact that it has come to bear what is not its original meaning shows that it is used in a peculiar sense, which can be proved under section 98 of the Evidence Act.

(1) (1855) 4 DeG. M. & G. 591, 627; (2) (1842) 9 C. & P. 355;

43 E. R. 638

8 E. R. 450.

(3) (1912) I. L. R. 36 Bom. 639.

Needless to say I do not think that there is anything in the decision of *Tulshi Pershad Singh v. Ramnarin Singh* (1), which relates to a document of 1850, renewing another of 1832, that conclusively establishes the meaning of the word *isemrari*. If I thought that was the effect of the decision, I should not enquire further into the matter. What their Lordships say, however, is that, though the words *isemrari molarari* do not *per se* convey an estate of inheritance, such an estate can be conveyed by these words and these words alone, if the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties showed that their intention was that such an estate should be conveyed. In other words if no evidence but a grant of an *isemrari* were produced, the tenant would not be able to claim an estate of inheritance, but if that, and that only, were produced by the landlord, the tenant would be entitled to show *alibi* that the grantor intended to give him an estate of inheritance.

I turn now to the evidence of the conduct of the parties. This is admissible to show their intention at the time the deed was executed, and this, on reflection, will be found to be very much the same question in another form as that of the meaning which the words generally bore at the time and place that the transaction took place. That such evidence of conduct is admissible seems to me well settled. Of course if the terms of a deed are perfectly plain and unambiguous, evidence cannot be given to show that the parties intended something else. *North Eastern Railway v. Hastings* (2). But as was pointed out by Lord Brampton in that case—if the deed is capable of two constructions conduct under it would be irresistible proof as to which construction was correct. And that in cases of this nature evidence of conduct is admissible, seems to me conclusively established by two decisions of the Privy Council namely *Watson v. Mahesh Narain Roy* (3), *Bilasmoni Das v. Raja Sheopur Singh* (4), besides that of *Tulshi Pershad Singh v. Ramnarin Singh* (1), already cited.

In dealing with the question of conduct, it is well to remember that a man's conduct is not only what he does but what he does not do, and that the latter is often much the most significant. And in the present case the significance of the conduct of the parties is in my opinion greatly enhanced by the fact that this is not a case of one or two grants. It would seem that the Raja contemplated the possibility of leasing out the whole of his estate. He certainly leased out a very large proportion of it. There were in all 644 leases and the granting of them extended over nearly two years. It is

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- (1) (1885) 1 L. L. R. 12 Calc. 117, (3) (1875) 24 W. R. 176,
 L. R. 12 I. A. 205. (4) (1882) 1 L. L. R. 8 Calc. 664,
 (2) [1900] A. C. 260 L. R. 9 I. A. 33

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impossible to believe that transaction on so wholesale a scale did not evoke widespread interest and comment, or that any important part of them could have been done unnoticed or inadvertently.

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The Registration Act of 1864 was extended to the Hazaribagh district on the 1st January, 1865, and we have not been shown any instance of registration before then. Under that Act all absolute transfers of land had to be entered in Book 1, and other transfers of land in Book 2. Books were printed by Government orders with certain so-called marginal spaces on the side of each page and in one of these spaces the nature of the instrument had to be entered. This had to be done in the presence of the parties, under the Government rules, which by section 64 "had the same force as if they were inserted in this Act." By the same rules all perpetual leases of immoveable property had to be entered in Book 1, and leases other than perpetual leases in Book 2. This continued to be the law until the passing of Registration Act, 1866, in April of that year.

Now I am convinced that the parties knew perfectly well what they were doing, and were not troubled by any doubts or misgivings. The evidence that has been given on both sides, of the enquiries that were made to allay the alleged doubts of the parties as to the meaning of the words *mokarari istemrani*, has been disbelieved by the Court below and to my mind is frankly incredible. It is not the appellant's case that he misled the tenants, and indeed such a plea would be fatal. If then the Raja had intended to give leases for life but had had misgivings that the word used might be construed as conveying a perpetual lease, what could have been easier than to insert suitable words such as *ta hayat* or *zindagi tak* to prevent future misconception? The plaintiff's witness Kissen Dyal admits that grants with these words were given in the Raj. On the other hand if the tenants thought they were getting perpetual leases but had misgivings that they might be construed as leases for life, what could have been simpler than to put in such words as *naslan bad naslan* or the like? Neither of these courses was adopted and the conclusion to which I feel irresistibly drawn is that, whether the parties meant the leases to be for life or perpetual, they were quite agreed as to the meaning and had no real doubts about it. If any doubts had existed, they might have remained unexpressed, while perhaps five or even ten leases were given. But I cannot believe that they remained unexpressed while 644 leases were given during a period extending over nearly two years. And I find it impossible also to believe that if such doubts had been expressed measures would not have been taken to resolve them.

What then was the meaning which the parties attached to the words? I think on this point the mode of registration is conclusive. Registration

is a solemn public action. *Gangamoyi Debi v. Troiluckhya Nath Choudhury* (1). The Registration officer, in order to write his books correctly, had to find out what the transactions were. From January, 1865, to April, 1866 he had to record their nature in the presence of the parties. He recorded them all as perpetual leases, and he registered them in the book in which perpetual leases were registered, and not in the book in which other leases were registered. All this must have been done publicly and to the knowledge of all. It is not suggested that any protest was ever made. Here too it seems to me that if these registrations were wrong, the error might have escaped notice for January and perhaps even into February. But I find it impossible to believe that it could have passed unnoticed for 15 continuous months. And the only inference that seems to me natural to draw is that it never struck the parties, their agents or the registration establishment that *tatemrari* could mean anything else than a perpetual lease as the Registrar recorded it.

I agree that no question of estoppel arises. After April, 1866, leases for life would also be registered in Book 1, and there is nothing to show that the necessity of recording the nature of the document in the presence of the parties continued. I do not think it likely that the defendants, who purchased long afterwards, knew what the law had been in 1865 and 1866 or could have been influenced by the registration of these documents in Book 1, which after April, 1866, would have been perfectly right even for temporary leases. It was laid down in *Najibulla Mulla v. Nusrat Misri* (2) that the way in which a document was registered is evidence of what the parties intended it to be. This was followed by Harrington J. in *Indra Bibi v. Jam Sirdar Ahirs* (3). It was also followed in *Jayatlhar Narain Prasad v. Brown* (4). I think the question, whether the proceedings in the Registration office are evidence of the intention of the parties, would depend on the further question whether they could be regarded as evidence of conduct, and that would depend upon whether the proceedings were taken with the knowledge and acquiescence of the parties. It has been argued that, if the Raja had openly stated to the Registrar that the leases were for life, the statements would not be admissible. Statements, however, are not conduct, and if the Raja had volunteered such a statement, it would have suggested that he himself was in doubt what he was granting—a doubt in the Raja's own mind could not be cleared up by evidence under section 93 of the Evidence Act. But conduct showing that he had no such doubts and himself assumed, a matter of course, that the words of the grant implied

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(1) (1906) I. L. R. 33 Calc. 537; (2) (1891) I. L. R. 7 Calc. 196.

L. R. 33 I. A. 60. (3) (1907) I. L. R. 35 Calc. 845.

(4) (1906) I. L. R. 33 Calc. 1133.

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perpetuity seems to me clearly admissible and much more valuable as evidence.

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The second principal reason, which leads me to believe that the parties understood the leases to import perpetuity, is the fact that the great majority of them were for two lives. Out of the 591 leases of which details are said to be available, we are informed that all but 49 are in two names, 8 are in the names of a Hindu and Mussalman and 28 in the names of men of different castes. Now it seems incredible to me that these can have been intended as joint tenancies. Such tenancies are unknown outside the joint family : *Jogeswar Narain Deo v. Ram Chandra Dutt* (1) followed in *Bai Divali v. Patel Bechardas* (2); and it is hardly imaginable that a Hindu and a Musalman should contract to hold land in common, and that on the death of one, the survivor should take his share. The learned doctor for the appellant agrees that the leases cannot have been intended to create joint tenancies but tenancies in common. In *Amir Khan's Case*, however, joint tenancies were definitely pleaded by the Raja and the evidence of the witness Chaudhuri Achile Lal Singh is to the effect that he understood his lease to grant a joint tenancy. He says that he took the lease in his own name and the name of his brother-in-law, so that, when he died, his brother-in-law might support his widow. But tenancies for life in common are almost equally difficult to understand. On that theory the parties intended that, on the death of one lessee, his heirs should be entitled to hold during the life of the other, in other words *pur autre vie*, a form of settlement hardly known in this country : *Watson v. Mahech Narain Ray* (3). This certainly would have been a very unusual arrangement, and if really it was intended by the parties it seems to me extraordinary that it should never have been put clearly into the contracts. Here too it must be remembered that the settling of all these contracts took nearly two years. It seems strange to me that not one of the 1,200 lessees should ever have asked that it might be explained what was to happen when one of the co-lessees died. If any had so asked, the difficulty is so apparent that it seems impossible that no steps should have been taken to set it at rest. On the other hand if the leases were perpetual, the difficulty did not arise and no explanation was necessary. The fact, therefore, that it is not suggested that this difficulty ever occurred to the parties, seems to me strong corroboration of the view that they understood the leases to be perpetual.

I need not refer in detail to the later cases on this point. They follow that of *Tulshi Pershad Singh v. Ramnarain Singh* (4) and so far, of course,

(1) (1896) I. L. R. 23 Calc. 670. (4) (1885) I. L. R. 12 Calc. 117;

(2) (1902) I. L. R. 26 Bom. 445

I. L. R. 12 I. A. 205.

(3) (1875) 24 W. R. 176.

I am in entire agreement with them. In *Agin Bindh Upadhyay v. Mehan Bakram Shah* (1) the case was one of a grant for maintenance to a wife, and the circumstances altogether negatived the supposition of permanency. In the cases dealing with the Hazaribagh leases the two circumstances which lead me to hold that they were permanent are not considered.

I have dealt at length with these two points because they seem to me inexplicable on the supposition that the leases were for life. I do not think it necessary to discuss at length the rest of the voluminous evidence in the case, because, although it may raise a strong probability in favour of one side or the other, it seems to me perfectly reconcilable with either side. Take for instance the other terms of the documents. There are stringent provisions against tree cutting and alienation. It is argued, and the force of the argument is apparent, that if the Raja was parting with the land for ever it would not matter to him whether trees were cut and the land alienated or not. On the other hand we find that similar provisions exist in all perpetual leases in the Burdwan Raj and Colonel Boddam explained the covenant against alienation as an attempt to take the leases out of the operation of section Cr of Act X of 1859. Moreover, it must be remembered that these leases constituted a new experiment and that the teekas that preceded them had not proved at all satisfactory. The Raja may have imagined that there was quite a possible chance that the experiment would fail, that the *mokharidars* would fall into arrears, and that the land would be back on his hands. All this evidence therefore seems to me quite reconcilable with the case of either side. Again much stress has been laid on the *gari sanads* and *mauzra sanads*. Their history is obscure, but the probabilities seem to be that they were given by the military authorities at the conquest of Hazaribagh, and subsequently confirmed by the Collector. In the enquiries, however, that preceded the Permanent Settlement a doubt was raised whether these were permanent tenures. Apparently while this doubt was being settled provisional *kabuliyaats* were taken from the holders, but ultimately the tenures were confirmed. It is argued that as these were *istemrars* tenures without words of inheritance, they show that *istemrars* then meant a permanent tenure. The S D A decisions show that it did not necessarily mean that. It is probable enough that the existence of these tenures had their share in creating the belief in the vicinity that *istemrars* tenures were perpetual. But they might have had that effect in any case, whether they were really heritable or not. In the first place, if they had contained words of inheritance, they might still have been talked about in ordinary conversation as *istemrars* tenures, and in the course of years have led people to attach the idea of permanence to

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istemrari tenures without words of inheritance. People do not talk about *istemrari al-aulal* tenures in ordinary conversation. In the second place the question of succession was never considered. They were a sort of service tenures under Government and while the services were performed Government would never have thought of resuming them. The only thing that was in doubt was whether the revenue was fixed.

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The appellant has produced some leases, in which the words *al-aulad* occur, and it is argued that they show that words of inheritance were used in Hazaribagh when an estate of inheritance was given. No doubt these documents are in his favour, but the fact that one conveyancer, if one can apply such a term to a Hazaribagh draftsman of the 'sixties, used words of inheritance in his documents, does not show that another, who did not use them, did not intend to convey an estate of inheritance. We have the authority of the P. C. that such an estate can be conveyed without words of inheritance. And these transactions are very different from the leases in suit. They are more sales than leases, by which I mean that they are executed, not to enhance the income of the grantor, but for a sum down. The rent reserved in every case is insignificant and it is evident that the so-called lease was granted simply for the premium. The leases in suit on the other hand are said to have increased the Raja's income by Rs. 40,000.

It is argued that the Raja would never have been ready to part with his whole property in this way. Here too there is force in the argument, but it is quite inconclusive. It might be argued, on the other side, that it would be altogether unsafe to set bounds to the improvidence of a Raja of country that was then largely jungle.

The subsequent conduct of the parties also seems to me quite insufficient to justify any decided opinion. The Raja who granted the leases died in 1866, and after years of litigation and management by the Court of Wards, the estate came into the hands of the present branch of the family in 1873. It may be doubted whether, if Raja Ram Nath had survived, the permanency of these leases would ever have been questioned. But Raja Nam Narain at once disputed the leases, and in 1875 instituted Amir Khan's case. After that the dispute was fairly afoot, and the subsequent conduct of the parties loses all its probative force. Before that the *mokararidars* executed about a dozen sales and sub-leases of their property, in which words of inheritance were not used, though they were clearly intended as out-and-out alienations. This evidence supports their case, but it is not, in my opinion, at all conclusive.

What is known as Prem Koeri's case is a curious incident. She was the mother of Raja Ram Nath and executed a *mokarari istemrari* lease with his sanction. When the *istemrari* died, she sued in 1871 to recover the property on the ground that they had left no male heirs. This conduct

seems to me equally inconsistent with the case of both sides and in any case the view taken by Prem Koer of the effect of the leases is of little or no value as evidence.

I hold that at the time of the execution of the leases the parties understood the word *istemrari* to mean a grant in perpetuity and that it did not occur to them that it could be construed as a lease for life. In this view I would dismiss the appeals

On the questions of estoppel and recognition I do not dissent from my learned brother's decision."

The judgments and decrees of the Court of first instance, *viz.*, of the Subordinate Judge, were thus confirmed. Thereupon, the plaintiff preferred these appeals under clause 15 of the Letters Patent.

Sir Rashbehary Ghose, Babu Basanta Coomar Bose, Babu Provash Chandra Mitra, Babu Sarat-kumar Mitra and Babu Susil Madhab Mallik, for the appellant.

Mr. N. Sarkar, Mr. P. N. Ghosh, Babu Shubhchandra Palit, and Babu Birajmohan Majumdar, for the respondents.

Babu Sarat Chandra Roy Chowdhury, for the respondents in L. P. A. Nos. 5, 11 and 14.

Babu Nareshchandra Singha (for *Babu Lalit Mohan Ghosh*), for the respondents in L. P. A. No. 17 of 1914 (in R. A. No. 96 of 1910).

[The arguments on both sides are fully set out in the judgments of Jenkins C.J., Woodroffe J., Mookerjee J. and Coxe J., and are consequently not reproduced here.]

Cur. adv. rul.

JENKINS C.J. This and the several connected appeals arise out of suits brought to recover possession of a number of immoveable properties on the ground that the several leases under which they were held have determined by the death of those to whom the leases had been granted.

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In their broad features the cases are all alike.

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This suit was instituted by Maharaja Ram Narain Singh, and on his death his heir and legal representative Lakhi Narain Singh was substituted in his place. Lakhi Narain Singh is a minor under the Court of Wards and Mr. Macgregor is his next friend.

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These leases were granted, not by Maharaja Ram Narain Singh, but by his predecessor Raja Ram Nath Singh, who died towards the end of 1866.

There is no dispute as to the fact of the leases; the question is whether the grantees, under them acquired interests terminable on death or heritable and permanent.

The suits were heard by the Subordinate Judge of zilla Hazaribagh who after a prolonged hearing decided against the plaintiffs. From his decree appeals were filed and they were heard at great length by Woodroffe and Coxe JJ. These learned Judges differed in opinion and so the decree was confirmed (section 98 of the Code of Civil Procedure).

From this judgment of the High Court, the present appeal has been preferred by the plaintiff under clause 15 of the Letters Patent. The terms of the lease in this appeal are set out in the judgment of Woodroffe J. and I need not repeat them. It will be observed that the lessees are two in number, Dilo Mahato and Chola Mahato. They were brothers. The date of the lease is the 15th Aswin Badi, 1922 Sambat (the 19th September, 1865). The document states that the brothers "have obtained '*i,temrari mokarari*' of mouza Mandiamo, one village in *pergana* Raunpur exclusive of *jaigir* and *birt* land, coal mines and subsoil rights from 1922 Sambat at an annual *jama* of Company's Rs. 672." The lessees then express their readiness to cultivate and improve the village, to keep the tenants contented and to construct *ahars* and so forth.

The rent is payable in *kists* and provision is made for certain small *salamis*. Default in payment of rent is to involve cancellation of the *mokarari*. Losses from drought and so forth are to fall on the lessees who undertake not to do anything injuriously affecting boundaries. Power to transfer is withheld, the cutting down of fruit-bearing and income-yielding trees is forbidden, and the obligation to replace fallen trees is imposed on the lessees.

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Though it is not so expressed in the lease, a *nazarana* equal in amount to one year's rent was paid as a consideration for the lease.

The leases to which this litigation relates were executed between the 27th of November, 1864, and the 22nd September, 1866, and they were the result of a change in the administration of the Raj. Whether they are actually from the same draft or not is, I think, immaterial: they are for the one and the same purpose and are a part of one and the same scheme of estate administration.

Before 1864 the practice had been to let out the land on short *ticca* leases of 5 or 6 years. This was found to be unsatisfactory and leases in *mokarari istemrari* were introduced. It is conceded by the plaintiff that the new system secured to the lessees fixity of rent and a measure of continuity, but it is maintained by him that this continuity was limited to the lives of the grantees in the absence of words of inheritance, such as *naslan lad naslan* or *ba farzandan* or *al-aulad*.

Before us the plaintiff has contended that this case is concluded by authority, and in particular he has relied on the decision of the Privy Council in *Tulshi Pershad Singh v. Ramnarain Singh*(1). This case, he maintains, establishes that the words *istemrari*

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mokarari in a *patta*, according to their customary meaning, are not alone sufficient to impart the quality of heritability, but that special circumstances for conduct are necessary and none such have been proved in this case.

The defendant's case has been presented before us by Mr. Sarkar who has not followed the line of reasoning that commended itself to Coxe J. and in that I think he acted wisely. Nor has he adhered rigidly to the reasoning of the Subordinate Judge.

He has not disputed the applicability of the decision in *Tulshi Pershad Singh's Case* (1); on the contrary he invoked its assistance, for he has claimed that it at any rate sanctioned the view that the words *mokarari istemrari* would suffice to create a heritable interest without express words of inheritance where local usage, the terms of the lease, the circumstances under which the lease was executed or the conduct of the parties justified that conclusion. And then he maintained that what was proved in this case sanctioned the view that a heritable interest had been created.

The phrase *mokarari istemrari* has been the subject of much discussion in the Courts and is to be found in many dictionaries and official manuals, but the pronouncement of the Privy Council in *Tulshi Pershad Singh v. Ramnarain Singh* (1) must be accepted by us as final. It is therefore necessary to see what precisely it was that this case decided. The question involved in *Tulshi Pershad Singh's Case* (1) was whether an *istemrari mokarari patta* was heritable or not. The lease was by the owner for the time being of a Raj to his son-in-law in renewal at an increased rent of a *patta* that had been executed in the year of the son-in-law's marriage. The locality was Bhagalpur.

(1) (1885) I. L. R. 12 Calc. 117; I. L. R. 12 I. A. 205.

On the death of the grantee a suit was brought by the grantor's successor to recover possession of the land in the *patta*. It was based on the ground that as the *patta* contained no express words of inheritance such as "*ba farzandan*" or "*naslan bad naslan*" the grantee only took a life estate. A custom of the Raj was also alleged under which hereditary grants for maintenance were only made to male members of the family and grants to daughters' husbands were for life.

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There was evidence of grants to male members of the family and to sons-in-law, and from these it appeared that in that family where hereditary interests were intended to be granted, words of inheritance were added. The Subordinate Judge held that the words "*istemrari mokarari*" alone conferred only a life estate, and passed a decree in the plaintiff's favour.

This decree was affirmed on appeal by the High Court where reliance was placed (among other things) on the improbability suggested by the fact that the grantee was a son-in-law.

On appeal to the Privy Council the decision was upheld. Reference was made to decisions in Sudder Dewani Adalat and the High Court, and then the judgment proceeded as follows: "After this review of the decisions, their Lordships think it is established that the words '*istemrari mokarari*' in a *patta* do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate could not be created without the addition of the other words that are mentioned, as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual."

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Their Lordships proceeded to say, "Such an intention was not shown in this case and in the argument before their Lordships the appellant relied solely upon the terms of the *patta*. As has been said, their Lordships, having regard to the customary meaning of the words as established by the decisions noticed, are of opinion that they do not convey an estate of inheritance in this case."

Of those decisions three are reported in the Sudder Dewani Adalat Reports, one being *Baboo Toolsee Nurain Sahee v. Baboo Modnurain Singh* (1) from Behar, the second *Amiroonnessa Begum v. Hetnarain Singh* (2) from Behar, the grant in that case being to a natural son, and the third, *Sarobur Singh v. Rajah Mehendernarain Singh* (3) from Bhagalpur. They all decide that the *istemrari mokarari* leases then under consideration were not hereditary but for the life of the grantee.

Passing to the decisions in the High Court, we find that *Musstt. Lakhu Kowar v. Roy Hari Krishna Singh* (4) came from Tirhoot. The Sudder ameen gave to the word *istemrari* the sense of perpetual: this was reversed by the additional Judges of Tirhoot, but was restored by the High Court

The comment on this case in *Tulshi Pershad Singh's Case* (5) suggests that, in their Lordships' opinion, the result might have been different, had the decisions of the Sudder Court previous to 1853 been referred to, and the effect ascribed to them is "that the words when used in a *patta* had a customary meaning."

The decision referred to as "the other case in the

- (1) (1848) S. D. A. 752;
10 I. D. (O. S.) 532.
(2) (1853) S. D. A. 648.
(3) (1860) S. D. A. 577.

- (4) (1869) 3 B. L. R. A. C 226.
(5) (1885) I. L. R. 12 Calc 117;
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High Court in 1877" would seem to have been *Nam Narain Singh v. Amir Khan*(1), instituted on the 26th February, 1875, in the Civil Court of the Deputy Commissioner of the District of Hazaribagh. The question was whether under a grant in *mokarari istemrari* a heritable interest passed. The High Court, confirming the decree of the Judicial Commissioner by which the decree of the Deputy Commissioner of Hazaribagh had been in turn confirmed, held that the document must be construed as a lease in perpetuity which would descend to the heirs of the lessee.

Raja Lilanand Singh Bahadur v. Thakur Munorunjun Singh (2), the next case referred to, came from Bhagalpore.

Their Lordships there referred to the expression *mokarari istemrari* and said it might be doubtful whether they meant permanent during the life of the person to whom they were granted or permanent as regards hereditary descent.

They do not seem to have drawn the distinction between the lexicographical and customary meanings, but to have accepted the sense of permanent or uninterrupted and treated the measure of performance as dependent on the subject-matter to which the term was applied, so that a life interest could as well be described as *istemrari mokarari* as a hereditary interest. There has been some discussion before us as to the precise force of the expression "customary meaning" as used by Sir Richard Coneh. Mr. Sarkar contended that it had reference to proved local usage, and to maintain this he referred to a remark in one of the noticed decisions of the Sudder Dewani Adalat. Sir Rash Behary on the other hand urged that its force was "accustomed," "popular," or "wonted."

(1) (1877) A. A. D. 533 of 1876. (2) (1873) 13 B. L. R. P. C. 121.
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Their Lordships proceeded to say, "Such an intention was not shown in this case and in the argument before their Lordships the appellant relied solely upon the terms of the *patta*. As has been said, their Lordships, having regard to the customary meaning of the words as established by the decisions noticed, are of opinion that they do not convey an estate of inheritance in this case."

Of those decisions three are reported in the Sudder Dewani Adalat Reports, one being *Baboo Toolsee Nurain Sahee v. Baboo Modnurain Singh* (1) from Behar, the second *Amiroonnessa Begum v. Hetnarain Singh* (2) from Behar, the grant in that case being to a natural son, and the third, *Sarobur Singh v. Rajah Mehendernarain Singh* (3) from Bhagalpur. They all decide that the *istemrari mokarari* leases then under consideration were not hereditary but for the life of the grantee.

Passing to the decisions in the High Court, we find that *Musstt. Lakhu Kowar v. Roy Hari Krishna Singh* (4) came from Tirhoot. The Sudder ameen gave to the word *istemrari* the sense of perpetual: this was reversed by the additional Judges of Tirhoot, but was restored by the High Court

The comment on this case in *Tulshi Pershad Singh's Case* (5) suggests that, in their Lordships' opinion, the result might have been different, had the decisions of the Sudder Court previous to 1853 been referred to, and the effect ascribed to them is "that the words when used in a *patta* had a customary meaning."

The decision referred to as "the other case in the

(1) (1848) S. D. A. 752;

10 I. D. (O. S.) 532.

(2) (1853) S. D. A. 648.

(3) (1860) S. D. A. 577.

(4) (1869) 3 B. L. R. A.C. 226.

(5) (1885) I. L. R. 12 Calc. 117;

L. R. 12 I. A. 205.

High Court in 1877" would seem to have been *Nam Narain Singh v. Amir Khan*(1), instituted on the 26th February, 1875, in the Civil Court of the Deputy Commissioner of the District of Hazaribagh. The question was whether under a grant in *mokarari istemrari* a heritable interest passed. The High Court, confirming the decree of the Judicial Commissioner by which the decree of the Deputy Commissioner of Hazaribagh had been in turn confirmed, held that the document must be construed as a lease in perpetuity which would descend to the heirs of the lessee.

Raja Lilanand Singh Bahadur v. Thakur Munorunjun Singh (2), the next case referred to, came from Bhagalpore.

Their Lordships there referred to the expression *mokarari istemrari* and said it might be doubtful whether they meant permanent during the life of the person to whom they were granted or permanent as regards hereditary descent.

They do not seem to have drawn the distinction between the lexicographical and customary meanings, but to have accepted the sense of permanent or uninterrupted and treated the measure of performance as dependent on the subject-matter to which the term was applied, so that a life interest could as well be described as *istemrari mokarari* as a hereditary interest. There has been some discussion before us as to the precise force of the expression "customary meaning" as used by Sir Richard Couch. Mr. Sarkar contended that it had reference to proved local usage, and to maintain this he referred to a remark in one of the noticed decisions of the Sudder Dewani Adalat. Sir Rash Behary on the other hand urged that its force was "accustomed," "popular," or "wonted."

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(unreported). L. R. I. A. Rep. Vol. 181.

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But its meaning is sufficiently established for our purposes by a decision of the High Court, binding on us, *Narsingh Dyal Sahu v. Ram Narain Singh* (1), to make further discussion unnecessary. It was there decided that a *patta* in the Hazaribagh district, in terms substantially identical with that in this case, came within the ruling in *Tulshi Pershad Singh's* case (2). Nor does *Narsingh Dyal Sahu's Case* (1) stand alone. It was followed in *Choudhri Gridhari Singh v. Mahiraj Ram Narain Singh* (3). An application was made in that case for leave to appeal to His Majesty in Council, but it was refused by the Privy Council (4).

For the purpose of this case, therefore, it must be taken as settled that the phrase *istemrari mokarari* in a *patta* in the district of Hazaribagh do not *per se* convey an estate of inheritance, but that it is open to us to see whether (a) the other terms of the instrument, (b) the circumstances under which it was made, or (c) the subsequent conduct of the parties show the intention with sufficient certainty to enable us to pronounce that the grant was hereditary.

Beyond this it has been contended that the words *istemrari mokarari* have acquired a local or special customary meaning in the locality which implies succession.

There is authority for this contention in an interlocutory remark of Banerjee J. in *Narsingh Dyal Sahu's Case* (1); whether it is the origin of the contention in this case or not appears to me to be of no real importance.

Before dealing with the contention of a special local meaning, it will be convenient to explain briefly

(1) (1903) I. L. R. 30 Calc. 883, 886. (3) (1905) R. A. 89 of 1902, decided

(2) (1885) I. L. R. 12 Calc. 117; on 4th May.

L. R. 12 I. A. 205.

(4) (1906) 10 C. W. N. cxlxxv.

the causes that led up to the grant of these *istemrari mokarari* leases. The former practice in the Raj had been, as I have already remarked, to let the villages to farmers on *ticca* leases of 5 or in some cases 6 years.

From the Tenuie Report (to the admission of which in evidence no objection was taken, apart from the question of its relevance) it appears that Maharaja Ram Nath Singh, observing that these farmers under the short *ticca* system had no permanent interest in the well-being of their tenants and that the only object the farmers had was to screw as much as possible out of the *raiylats* without doing anything to improve their villages, in order to remedy these evils determined to create *mokarari* tenures. Accordingly in 1864 he gave all that came forward and agreed to pay double the rent formerly assessed on the village and a *salami* or *nazarana* equal to one year's increased rental, leases containing the words *istemrari mokarari*, but omitting all mention of heirs and successors.

The plaintiff's witness Kissen Dyal confirms this statement as to the amount of *nazarana*. From the evidence of Chowdhuri Achhe Lal Singh, it seems that there had been great difficulty in collecting the *ticca* rent, and this witness called by the plaintiff, explains that there were three reasons for the *mokarari* settlements, (i) the improvement of the lands, (ii) the greater facility in the collection of rents, and (iii) the increase of income.

Kissen Dyal deposes that there was a considerable debt of the Raj when Ram Nath came to the *gadi*, and he explains that the *mokararis* fetched income and the income and the *salami* went to pay off the debt.

I will now deal with the contention that the local meaning of the words implies succession.

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The defendant bank in its written statement alleged that the term *istemrari mokarari* had obtained a customary meaning attached to it in the district of Hazaribagh, viz., that it was used whenever the lease was intended to be permanent and hereditary in character. Among the issues raised were the following: (i) Did the *mokarari istemrari* lease granting the village in suit to the original grantees secure any heritable interest to the heirs or was it for the life only of the original grantees? (ii) Have the words *mokarari istemrari* any special customary meaning?

The trial Judge thought that in Hazaribagh the phrase indicated a permanent and heritable interest and though his reasoning may not be free from criticism, his view of a topic so essentially local is entitled to consideration.

Though these leases were a new departure in 1864, the learned Judge points out that *istemrari mokarari* was not an unknown phrase, and that there were in this locality interests under *gadi sanads* known as *mokarari istemrari* which were heritable and not terminable with the life of the grantee.

One of such tenures, it is said, had actually been purchased by a predecessor of the plaintiff. It is further brought to our notice that alongside of these permanent interests, there were others that were terminable to which the description *istemrari mokarari* was not applied. Then the mode in which these leases were registered has been invoked as a strong indication that the phrase was understood locally to confer a heritable interest.

Coxe J. treated the circumstance as conclusive: Mr. Sarkar was more moderate in his contention, and in that I feel no doubt he was right. It may have been the official view that an *istemrari mokarari* lease was an absolute transfer, but there is nothing

to show that the Government directions were limited to Hazaribagh. On the contrary these registration rules would be of universal application and would govern official routine, notwithstanding the Privy Council pronouncement, just as we find to be the case in the official Settlement Manual and Administration Report.

True it is that it does not appear that the Raja or his men objected to the mode of registration, but we know little or nothing of the circumstances, certainly not enough to justify a conclusive inference as to the local meaning of the phrase.

Then it has been contended that the numerous transfers and other dealings with these *istemrari mokarari* interests is a strong indication of the local meaning of the phrase. These transfers and dealings may excite some sympathy and prompt a wish to assist those who have dealt with these interests in the honest belief that they were hereditary. This, however, cannot take the place of proof, and as proof I do not think the transactions come to much. An interesting synopsis of these transactions has been placed before us, which demonstrates the growth of the idea that permanent interests had been created.

The transfers have been collected under several heads. Under the first are dealings prior to the decision of Prem Koer's suit by Col. Bodlam on the 12th March, 1872, and in the documents of this period we find some such expression as "so long as the *mokarari istemrari* lasts." In the dealings during the period after the decision of Prem Koer's suit and before the institution of Amir Khan's suit, no such qualifying words appear. In the final period, that is to say, after the decision in *Amir Khan's Case* (I), we find in the instruments such expressions as this "I

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or my heirs," or „descending to progeny," "generation after generation" "absolute owners," "perpetual right of the proprietor."

If the public now deal in these *istemrari mokarari* leases as though they were perpetual, it may be that they are influenced by the decisions in Prem Koeri's suit and Amir Khan's suit. But that cannot be accepted as any indication of the sense in which the phrase *istemrari mokaruri* was locally understood at the time the leases were granted, and that is the point with which we are concerned.

But while the defendant points to these transfers and dealings as indicating that *istemrari mokarari* leases were perpetual in character the plaintiff relies on the fact that in many *pattas* express words of inheritance are to be found in addition to the phrase *istemrari mokarari*, as though that phrase would not alone suffice to create a perpetual interest. Indeed in some cases it is the grantees under *istemrari mokarari pittas* who take under the *al-aulad* grants. And the plaintiff has followed this up by bringing to our notice an instance in which *istemrari mokarari pattas* have been converted into *al-aulad pittas* in consideration of the payment of a premium and an increased rent. It may be true that we do not know all the circumstances which led to this transaction, but that is almost inevitable having regard to the date; still it is not without its value as a support to the plaintiff's contention.

There is oral evidence as to the existence or non-existence of a special customary meaning of *istemrari mokarari* in Hazaribagh, but neither side has relied as much on it as on the other indications in the case, and it certainly is not of a character to establish either the one view or the other.

On the issue with which I am now concerned, what

has to be proved is, not that in the opinion of anyone, whether a witness or not, the phrase *istemrari mokarari* implies heritability, but that in the district of Hazaribagh it has that special customary meaning.

In *Narsingh Dyal Sahu's Case* (1), which came from the district of Hazaribagh, no such special customary meaning was established; nor do I think it has been proved in the present case. And in coming to this conclusion I have endeavoured to give full effect not only to each separate circumstance on which the defendant relies but to their combined operation.

Before leaving this part of the case, I would wish to make one saving reservation. I have, for the purpose of the argument, treated the words *istemrari mokarari* as capable of a special customary meaning denoting hereditability. But I do not decide that this is so, and I would desire to reserve for future consideration the question what the true method of approaching the problem is.

Having then decided that the defendant has not established a special customary meaning of the phrase *istemrari mokarari* importing succession, I now proceed to consider the terms of the lease, the circumstances in which it was executed and the subsequent conduct of the parties.

This is in accordance with the decision of the Privy Council in *Tulshi Pershad Singh's Case* (2), which in this respect reflects what was laid down in the earlier decision in *Watson's Case* (3). Now, in dealing with this part of the case, it is at once apparent that to a greater or less extent the discussion of the several topics has been anticipated by the decision

(1) (1903) 1 L.R. 39 Calc 843 (3) (1875) 24 W.B. 176.

(2) (1885) 1 L.R. 12 Calc. 117, 1 L.R. 12 I.A. 205.

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1915 delivered by Banerjee J. in *Narsingh Dyal Sahu v. Ram Narain Singh* (1).

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On the question of the inference to be drawn from the terms of the lease, the materials before the Court were to all intents and purposes the same as they are in the present case, and the Courts' decision was adverse to the defendant's contention. But apart from this, I come to the same conclusion in this case. So far from these terms showing an intention to create a perpetual interest, they appear to me to tend in the other direction. In saying this I do not forget the provision as to improvements and the ingenious arguments founded on it. It is in terms that impose no duty to which a numerical expression can be given, and does little more than declare that as between grantor and grantees the burden of improvements is to fall on the grantees. With the actual improvements effected I will deal when I discuss the conduct of the parties.

On the other hand, the provisions as to trees and the restraint on transfer do not point to a grant in perpetuity. And I say this notwithstanding the suggested explanation based on Exhibit X 5. It is significant that these restrictions are not to be found in *al-aulad* grants. And the fact that the grants are made in two names, whether it be to husband and wife, father and son, grandfather and grandson, brothers, cousins or strangers, points, in my opinion, to leases for lives rather than in perpetuity. And in so saying I do not overlook Mr. Sarkar's argument that at any rate the fact that some of the leases were taken in single names shows that the grantees thought a right of inheritance was bestowed, as otherwise they would have insisted on two lives to prolong the term of the lease, and all the more as some of these single

lessees were servants of the Raj. But it may well have been their association with the Raj that accounted for this circumstance.

And there is another matter, not without its significance, that although *nazarana* was paid, it was not mentioned in the *patta*, although, we are told, *nazarana* is expressly mentioned in those leases which are unquestionably perpetual.

This brings me to the circumstances in which the instrument was made, or, as it has been termed by their Lordships of the Privy Council, in *Watson v. Mohesh Narain Roy* (1), "the circumstances existing at the time of the document being entered into." I have already explained and need not repeat how these *istemrari pattas* came to be adopted. The rents, it will be remembered, were doubled, and a *nazarana* was paid equal to one year's increased rent. It is a circumstance to be taken into account that these *istemrari mokarari* leases were granted, not by way of bounty, but as a matter of bargain, and I certainly do not overlook this fact and the contentions based on it. But it obviously is far from conclusive as the decisions show.

For the defendant it is contended that the increased rent reserved and the *nazarana* paid afford strong proof that permanency was intended. The increase in rent, amounting, it is said, to Rs. 70,000 odd, is not without its relevance; it in some measure meets the usual retort that the landlord would not be likely to forego the favouring chances of future possibilities, and it may even be utilized by the tenant for the purpose of contending that the only inducement for the high rent which perhaps exceeds the present productive capacity of the land is the certainty that future improvement and enhancement of value will recoup the

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outlay. But it detracts from the value of enhanced rent as an indication of permanency that the rent ceases with the determination of the interest. This, however, cannot be said of *nazarana*, and if it be considerable in amount relatively to the value of the land, in other words, if it represents many years' purchase, it would undoubtedly tell in favour of permanency. In the cases before us the rent has been increased; and as far as I can judge the increase amounts to double the former rent.

Mr. Sarkar has argued that the increase was such that a rack rent became payable and on this he laid great stress; but I am far from being convinced of the correctness of his statement. On the contrary, it appears that in some cases at any rate properties were sublet at an increased rent. Moreover, it has to be borne in mind that an increase of rent was no new departure. On each new *ticca* there was an increase. It may have been only of one anna in the rupee, but then the term of the *ticca* was only five or six years.

The amount of *nazarana* was by no means so great as to suggest the inference that it represented the purchase of an interest in perpetuity, and here too it must not be forgotten that a *nazarana*, though smaller in amount, was payable on the grant of *ticca* leases.

In connection with this part of the case, it was argued very strenuously by Mr. Sarkar that the plaintiff had failed to call as a witness one Radhika Das, although he was in his list of witnesses and had failed to produce certain documents that had been called for by his client. This, he maintained, entitled him to the benefit of the presumption that evidence which is withheld would be unfavourable to the person in whose possession or under whose control it is. But in my opinion the plaintiff was under no obligation to call this witness; on the contrary, he may have had

good reason for not putting him in the witness box. Nor is it proved to my satisfaction that there was any withholding of documents that would justify an unfavourable presumption. It is suggested that the applications for *istemrari mokarari* documents were called for, but this is not made out. And for what it may be worth, a bundle of documents chosen at random were in the course of the argument produced by Sir Rash Behary for Mr. Sarkar's inspection, and they disclosed nothing favourable to the defendant.

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This brings me to the consideration of the conduct of the parties since the execution of the lease. The conduct of the public would be relevant, if at all, only on the issue, with which I have already dealt, of the special customary meaning of the phrase *istemrari mokarari*.

The original lessor died so soon after the granting of the leases, i.e., in 1866, that there is no conduct on his part to be considered.

One transfer apparently was executed before his death, but no circumstances are disclosed which would give rise to any inference. And I would here recall the fact that I have already dealt with the general topic of transfers and their effect. And what I have pointed out in reference to transfers would apply with equal force to improvements. But then it is said that the case set up by the widow Prem Koeri in a suit brought by her in 1871 goes to show that the grants were regarded as more than for life. But at the same time the fact that she sought to resume equally demonstrates that she thought the grant was terminable, though she may have been under a misapprehension as to the life or lives by which it was to be measured. Nor can it be overlooked that Prem Koeri was only a widow and that the subsequent successor would not be bound by what she did.

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The absence of a death register seemed to the Subordinate Judge to be a circumstance of some importance, as an indication that the leases were permanent, but there was no register of *jaigirs*—only notes,—and I do not regard the circumstance as of any great value. Nor am I able to hold on the strength of the *Hakima Taidid* that the *istemrari mokarari pattas* created estates of inheritance.

Apart from these several circumstances with which I have briefly dealt, there is no conduct which helps the defendant's case. On the contrary, we have the significant fact that the plaintiff and his predecessor throughout disputed the grantees' claim to an interest in perpetuity. This disposes of all the appeals, except those numbered 5, 11, 14 and 17. These have been separately discussed before us, but the lessees' contention has rested on a misinterpretation of the *pattas* to two persons. In my opinion, the duration of these *pattas* is to be measured, not by the continuance of the joint lives but also by the life of the survivor and this affords a complete answer to the pleas of limitation, recognition and occupancy right. In all other respects these appeals are governed by the same considerations as the remainder.

And as to them I have come to the conclusion that these *istemrari mokarari* leases have not conferred interests in perpetuity. In the suit out of which Letters Patent Appeal No. 2 of 1914 arises, therefore, I think the appeal should be allowed and the decree set aside, and a decree passed in favour of the plaintiff for possession of the property claimed in the plaint.

In view of the divergence of judicial opinion which has marked this case, we direct the parties to pay their own costs throughout. We further direct that the plaintiff do recover mesne profits, up to the date of

this judgment, at the rate at which rent is payable under the lease; if the defendants choose to continue in possession, they will be liable for mesne profits at the full rate from after this date.

This judgment governs all the appeals and similar decrees will be drawn up in all the cases.

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MOOKERJEE J. The subject-matter of the litigation which has culminated in this appeal, is immoveable property granted, by way of *istemrari mokarāri* lease, on the 19th September, 1865, by the predecessor of the plaintiff, the Maharaja of Ramgarh, to Dilo Mahato and Chola Mahato. The terms of the lease are set out in the judgment of Woodroffe J., and need not be reproduced here. On the death of both the lessees, the plaintiff instituted this suit for recovery of possession of the village from the defendants, the representatives of the lessees, on the allegation that the lessees held under a life-grant. The defendants contended that the leasehold interest was permanent and heritable and that they were entitled to hold the land as representatives, in interest of the original lessees. The question in controversy, consequently lay in a very narrow compass, namely, did the lease convey a permanent heritable interest as alleged by the defendants, or an interest limited in duration to the lives of the lessees only, as the plaintiff contended. The Subordinate Judge found in favour of the defendants and dismissed the suit. On appeal to this Court, the Judges of the Division Bench were equally divided in opinion. Woodroffe J. took the view that the question should be answered in favour of the plaintiff and the suit decreed. Coxe J. was of opinion that the view taken by the trial Court was correct and that the appeal should be dismissed. Consequently, the decree of the Subordinate Judge stood confirmed

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under section 98 (2) of the Civil Procedure Code, 1908. The present appeal has been preferred under clause 15 of the Letters Patent, and the arguments, though possibly not so elaborate as those addressed to the primary Court or to the Division Bench, have occupied ten days, although the question of the legal effect of an *istemrari mokarari* grant is by no means of first impression and has formed the subject of discussion in cases of the highest authority, which are binding on us and cannot be ignored.

The question of the true meaning of the expression *istemrari mokarari* has been considered by the Judicial Committee on at least three occasions. In a case of *ghatwali* tenures where the words *mokarari istemrari* were used, this Court ruled that the holding was perpetual: *Munrunjun Singh v. Rajah Lelanund Singh* (1); on review, *Rajah Leelanund Singh v. Thakoor Monorunjun Singh* (2). On appeal from that decision, the Judicial Committee held that the expression might mean either permanent during the life of the person to whom the grant was made or permanent as regards hereditary descent: *Raja Lilanand Singh Bahadur v. Thakur Munorunjun Singh* (3). This view was re-affirmed and amplified by the Judicial Committee in the case of *Tulshi Pershad Singh v. Ramnurain Singh* (4), where Sir Richard Couch observed as follows: "It is established that the words *istemrari mokarari* in a *patta* do not *per se* convey an estate of inheritance, but they do not accept the decision as establishing that such an estate cannot be created without the addition of the other words that are mentioned (such as *ba furzandan, naslan bad naslan*), as the Judges do not seem to have had in

(1) (1865) 3 W. R. 84.

(3) (1873) 13 B. L. R. 124;

(2) (1866) 5 W. R. 101.

L. R. I. A. Sup. Vol. 181.

(4) (1885) I. L. R. 12 Calc. 117; L. R. 12 I. A. 205.

their minds, that the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the Court to pronounce that the grant was perpetual." Sir Richard Couch here adopts the very words of Garth C. J. in *Sheo Pershad Singh v. Kally Das Singh* (1), subsequently affirmed on appeal to the Judicial Committee, *Bilasmoni Dasi v. Raja Shropersad Singh* (2). This formulation of the true meaning and effect of the expression under consideration was based, be it noted, not on the special circumstances of the case, such as that the particular gift was to a son-in-law or that there was a family custom of life-grants, but upon a review of the earlier decisions on the subject, three of them given by the Sudder Dewani Adalat and two by this Court. The decisions in the Sudder Court, namely, *Toolsee Nurain Sahee v. Baboo Mod-nurain Singh* (3), *Amerroonissa Begum v. Hetnarin Singh* (4) and *Sarobur Singh v. Rajah Mehender-narin Singh* (5), supported the view that a *mokarari istemrari* lease does not import heritability, unless expressions such as *ba farzandan* or *naslan bid naslan* find a place in the deed. On the other hand, the cases of *Mussamat Lakhu Kowar v. Roy Hari Krishna Singh* (6) and *Nam Naram v. Amir Khan* (7), to which may be added the cases of *Tekait Manoraj Singh v. Raja Lilanund Singh* (8) and *Karunakar Mahati v. Niladhro Chowdry* (9), affirmed the proposition that the words *mokarari istemrari*

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| (1) (1879) I.L.R. 5 Calc. 543 555. | (6) (1869) 5 B.L.R. A.C. 226. |
| (2) (1882) I.L.R. 8 Calc 664; | 12 W.R. 3. |
| I.R. 9 I.A. 33 | (7) (1877) S.A. 533 of 1876,
decided on 4th Sept. |
| (3) (1848) S.D.A. 752; | (8) (1867) 2 B.L.R. 125 n |
| 10 I.D.(O.S.) 512. | (9) (1870) 5 B.L.R. 652, |
| (4) (1873) S.D.A. 648. | 14 W.R. 107. |
| (5) (1860) S.D.A. 577. | |

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contained in a *patta* must be taken in themselves to convey a hereditary right in perpetuity. The decision of the Judicial Committee overruled both sets of cases, the former in so far as it was held that express words indicative of heritability were not necessary to prove that a heritable interest had been created, the latter in so far as it was held that the expression indicated continuity of tenure but not necessarily permanency as regards hereditary descent. This view was treated as settled law in *Beni Pershad Koeri v. Dudhnath Roy* (1), where Lord Davey said that an *istemrari mokarari* tenure is not necessarily a perpetual hereditary tenure. Reference may, in this connection, be made to two other decisions of the Judicial Committee. *The Government of Bengal v. Nawab Jafur Hossein Khan* (2) and *Bilasmoni Dasi v. Raja Sheopersad Singh* (3), where the word *mokarari* was used without the addition of the word *istemrari*, and it was ruled that though the term *mokarari* might import perpetuity, that was not the necessary meaning of the word. The exposition contained in these decisions of the Judicial Committee has been treated as conclusive in three recent cases in this Court: *Agin Bindh Upadhyay v. Mohan Bikram Shah* (4), *Narsingh Dyal Sahu v. Ram Narain Singh* (5) and *Choudhri Gridhari Singh v. Maharaj Ram Narain Singh* (6). In the case last mentioned, an application was made to this Court on the 23rd January, 1906, for leave to appeal to His Majesty in Council; the application was refused on the ground that the matter was concluded by the decisions of the Judicial Committee and the proposed appeal could not be said to involve a substantial

- (1) (1899) I. L. R. 27 Calc. 156; (4) (1902) I. L. R. 30 Calc. 20.
 L. R. 26 I. A. 216. (5) (1913) I. L. R. 30 Calc. 883.
 (2) (1854) 5 Moo. I. A. 467. (6) (1905) R. A. 89 of 1902, .
 (3) (1882) I. L. R. 8 Calc. 664; decided on 4th May.
 L. R. 9 I. A. 33.

question of law. An application was then made to the Judicial Committee, for special leave to appeal, but the application was refused: *Choudhri Girdhar Singh v. Maharaj Ram Narain Singh* (1). In those circumstances, the attempt to establish, that the meaning attributed to the expression by the Judicial Committee is erroneous, by reference to lexicographical works or to the writings of authors of repute on the land-law of this province, can be characterized only as belated and futile; but I desire to add that, as will appear from the extracts from lexicographical works appended to this judgment, there is really no foundation for the suggestion that the view taken by the Judicial Committee is erroneous. As regards the statement by Field in his *Introduction to the Institutions of the Bengal Code*, 1875 (p. 39) and by Phillips in his *Tagore Lectures on Land Tenures*, 1876, p. 317, it is plain that they have no independent value. It is no disparagement to the unquestioned erudition of these learned authors to point out that their view upon this question was based upon judicial dictation which can no longer be regarded as good law in view of the rule enunciated by the Judicial Committee in *Pulshi Pershad Singh v. Ramnath Singh* (2). Thus, the notes to section 38 of Reg. VIII of 1793 by Field make it manifest that he founded his view on the dictation in *Mussamat Lakhoo Kowar v. Roy Hart Krishan Singh* (3) and *Karanakar Mahatty v. Naladhar Chunderdhry* (4) which are also mentioned by Phillips. It is interesting to observe that Field himself makes a more qualified statement in his later work "Digest of the Law of Landlord and Tenant" (1879), page

- (1) (1906) 16 C. W. N. cclxxxv. (2) (1869) 3 B. L. R. A. C. 226.
 (2) (1885) 1 L. R. 12 Calc. 117. (3) 12 W. R. 3.
 L. R. 12 I. A. 205. (4) (1870) 5 B. L. R. C. 2.
 14 W. R. 107.

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(3) (1869) 3 B. L. R. A. C. 225.

(2) (1825) 1. L. R. 12 Calc. 117;

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(4) (1870) 5 B. L. R., 652;

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25. Thus, whatever weight might otherwise be due to the opinions of Field and Phillips, the position is obviously different when we know the sources of their view and how their authority has been destroyed by subsequent pronouncements of the highest judicial tribunal. We must consequently accept the position as uncontestable that the expression *istemrari mokarari* does not *per se* convey an estate of inheritance, but that an *istemrari mokarari patta*, notwithstanding the absence of words indicative of heritability, such as *ba farzandan*, *naslan bud naslan* or *al-aulad*, may be a perpetual grant if the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, show such an intention with sufficient certainty. That this is a legitimate mode of enquiry is clear from the decision of the Judicial Committee in *Watson v. Mohesh Narain Roy* (1). It is accordingly necessary to consider the case before us in each of the three aspects just mentioned.

First, as to the other terms of the instrument. These are by no means decisive in favour of the defendants. The clauses which impose a restraint on transfer and on the cutting down of fruit-bearing or income-yielding trees and make it obligatory on the lessees to plant another tree in place of any that might fall down by itself, are not consistent with the theory that a perpetual grant was intended. On the other hand, the clause which throws the cost of improvement on the lessees indicates some measure of continuity, but not necessarily perpetuity. The fact that the lease was in favour of two lessees—we are told that out of 591 leases of the same type as the one before us, as many as 545 were in favour of two persons,—points to the conclusion that though some measure

of continuity was desired, perpetuity was not intended; for if the lease was intended to be perpetual, it would be unnecessary to have recourse to the familiar device of a grant in favour of two or more persons so as to minimise the chance of expiry of the lease on the premature death of a single grantee. We have further the important circumstance that though a premium was paid, the fact was not recited in the deed; if the lease was intended to be perpetual, such recital could hardly have been omitted, for a substantial premium is one of the surest indications of a permanent grant. The terms of the lease, taken as a whole, do not, in my opinion, assist the defendants; on the other hand, they tend to weaken, if not to negative, the theory of a permanent grant.

Secondly, as to the circumstances under which the grant was made. It is established that up to 1864, the practice prevailed in the estate of the Maharaja of Ramgarh to grant temporary leases to tenants usually for a term of five years, in some instances for a term of six years; on each grant a premium of a year's rent was taken, and upon the expiry of the terms, when a fresh grant was made, the rent was enhanced by one anna in the rupee. This system of temporary leases had resulted in its attendant evils; the lessees had no inducement to improve the lands; they were exposed to the temptation to exact from their under-lessees as much as they could during their terms, and they were by no means punctual in the payment of rent to the Maharaja. To remove these evils and also to raise money to free the estate from the claims of creditors, a change in the mode of administration was introduced. Tenants were offered *istemrari mukarari* leases on condition that they agreed to pay double the previous rent, and also paid a premium equal to one year's rental at the enhanced rate. The

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offer proved attractive, and between the 27th November, 1864, and 22nd September, 1866, 644 such leases were granted; of these 591 have been traced. The result was the realisation of about Rs. 1,40,000 as premium, while the annual rent roll was raised by Rs. 70,000. Do these circumstances indicate with sufficient certainty, an intention to create permanent leases? No doubt, something more stable and less precarious than the temporary leases then usual was intended, but we cannot say definitely that a perpetual grant was intended. True, the rent was doubled and a premium was paid to the extent of the new rent for a year; but we must remember that even in the case of successive temporary leases for short terms, the rent was enhanced periodically and a premium was levied on each occasion. I do not think it can reasonably be said that what the lessees risked by paying double the previous customary rent and by agreeing to pay double the previous bonus could have been risked by a business man only on the assumption that he was granted in return a perpetual tenure. A tenure certain for life of the longer liver of the two lessees was obviously more certain and continuing than a temporary lease for 5 or 6 years, so that the tenants might well have consented to the terms actually offered to them. It is besides clear that even the new rent could not be described as rack rent and left the lessees an appreciable margin of profit. My conclusion is that the surrounding circumstances, as they are known to have existed at the time of the execution of the leases, one of which is before us, do not assist the contention of the defendants.

Thirdly. as to the subsequent conduct of the parties. We have here to consider conduct nearly contemporaneous with the execution of the lease as also conduct many years later. Under the first branch, we have

the circumstance that the leases were registered under the provisions of the Indian Registration Act (XVI of 1864) in a register which, under the statutory rules then in force, was to record all absolute transfers of immoveable property. Reliance has been placed upon the cases of *Najibulla Mulla v. Nusir Mistri* (1), *Jagatdhar Narain Prasad v. Brown* (2), and *Indra Bibi v. Jain Sirdar Ahiri* (3) in support of the contention that the mode in which registration was effected is relevant for the purposes of the present enquiry. Assume that this argument is well founded, but how does it assist the defendants? The mode in which the registration was effected shows at best that the registrar took the leases to be perpetual grants. There is nothing to indicate that the lessor or the lessees made any admission before him on the subject. This factor is, in my opinion, not only not conclusive but its weight is infinitesimal. As regards the second branch, namely, conduct subsequent, so far as the grantor is concerned, there is nothing to bind him, as he died in 1866 shortly after the leases had been granted. As regards his successors, the only circumstance worthy of mention is an allegation by Maharani Prem Koeri in her suit against Hitoo Koeree, decided by Col. Boddam on the 12th March, 1872, that an *istemrari mokarari* lease would continue so long as there were male heirs of the grantee. This is obviously valueless, first, because the statement by a limited owner could not bind the present Maharaja, and, secondly, because the statement, taken as a whole, does not support the present case of either party. As regards the conduct of the grantees, reliance has been placed upon two circumstances, namely, first, that in some instances valuable improvements have been effected, and, secondly, that successive

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(1) (1881) I. L. R. 7 Calc. 196.

(2) (1906) I. L. R. 33 Calc. 1133.

(3) (1907) I. L. R. 35 Calc. 845.

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transfers of the leasehold interest have been made on the assumption of its heritability and its permanence. As regards improvements, the lease itself, as already stated, provides that the cost shall be borne by the lessees; consequently the fact that the lessees have made improvements at their own expense does not show that the lease was intended to be permanent. As regards dealings with the property, it may be conceded that transfers have been made in many instances on the assertion that the leasehold interest was permanent and heritable. But there is nothing to show that these assertions were made with the knowledge or with the concurrence of the representatives of the grantor. On the other hand, an examination of the documents, whereby the transfers were effected, discloses a significant development in the phraseology used. In the earlier documents, the expressions used are more or less colourless, while in the later instruments, definite expressions indicative of heritability and permanence make their appearance. The influence of the decisions in the cases of *Prem Koeri v. Hitoo Koeree* and *Nam Narain v. Amir Khan*, is distinctly visible here, and I do not think much weight can be attached to the circumstance that the later documents evidence an assertion of heritability and permanence. On the other hand, we cannot overlook, what cannot by any means be treated as an insignificant circumstance, namely, that in some instances at least the holders of *istemrari mokarari* grants had them converted into *al-tulad* or hereditary grants on payment of fresh premium and enhancement of the rent. In my opinion, the conduct of the parties subsequent to the grant does not indicate with any approach to certainty, that the lease was intended to be perpetual.

Finally, there is only one other aspect of the case

left for consideration, namely, is it established that at the time of grant of the lease, the expression *istemrari mokarari* had acquired a customary local meaning in the district of Hazaribagh, in other words, that the expression was used to connote a grant of a permanent and hereditary character? A large body of oral evidence has been adduced in support of an affirmative answer to this question. That evidence is, in my opinion, valueless for two reasons. In the first place, the evidence does not with precision refer to the period antecedent to or contemporaneous with the grant of the leases. Assume for a moment that the words are shown to have a special local meaning now; we cannot apply the principle *presumunter retro*. The assertion that the expression has acquired a customary local meaning implies that the ordinary meaning is something different; the vital point, consequently, is when did it acquire a special meaning, assuming that it has a special meaning at the present moment? Unless it is shown that the alleged special meaning was prevalent in 1861, it is of no assistance to the defendants; and this has not been proved. In the second place, the oral evidence fails to establish that the expression has a customary local meaning. No doubt, as stated by Lord Lindley in *Chatenay v. Brazilian Submarine Telegraph Company* (1), the meaning of words is a question of fact, though the effect of words is a question of law. But the existence of the alleged customary local meaning is not proved merely by the assertions of witnesses that, in their opinion, the expression has a particular meaning. If the oral evidence is thus inconclusive upon the question of a special customary local meaning, we are left with the evidence of what has been described as *gadi sanads*

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granted from 1780 to 1860. These, it is said, were *mokarari istemrari* but had been treated as hereditary. The history of these *sanads* is narrated in the judgment of Woodroffe J. and I agree with his conclusion that the evidence as to their true character is too uncertain to justify the conclusion that the expression *istemrari mokarari* had in 1864 acquired the customary local meaning attributed to it.

The position, consequently, is that the use of the expression *istemrari mokarari* does not necessarily show that the lease was perpetual, and the defendants have failed to prove that the phrase had acquired a special local customary meaning in 1864. The other terms of the lease, the surrounding circumstances at the time of its execution and the subsequent conduct of the parties also fail to show with sufficient certainty that the intention of the parties was to create a permanent and heritable interest so as to enable the Court to pronounce that the grant was perpetual. We have, on the other hand, the undeniable fact that at the time the leases were granted, the idea was universally held that the holder of an imparible zamindari like the Ramgarh Raj could not encumber the corpus of the estate so as to bind his co-parceners except for justifiable special causes; indeed, it was not till 1888, that the contrary view was authoritatively formulated by the Judicial Committee in *Sartaj Kuari v. Deoraj Kuari* (1). This is a circumstance which we may legitimately take into account, for in the words of Willes J. in *Lloyd v. Guibert* (2), the rights of the parties to a contract are to be judged of by that law by which they may justly be presumed to have bound themselves: *Abdul*

(1) (1888) I. L. R. 10 All. 272; (2) (1865) 6 B. & S. 100, 133;
L. R. 15 I. A. 51. 122 E. R. 1134.

Aziz Khan v. Appayasami Naicker (1). It is thus extremely improbable that the grantor should have in 1865 made a long series of perpetual leases in contravention of what was then the accepted law. From every possible point of view, consequently, the defence proves unsustainable.

In four of the connected appeals (5, 11, 14 and 17), special points have been raised in addition to the main ground already considered, namely, that the defendants have acquired a right of occupancy, that they have been recognised as tenants after the death of the original lessees and that the claim is barred by limitation. There is no substance in any of these objections. The leases were not agricultural leases for purposes of cultivation, but were intended to create tenures; no question of acquisition of occupancy right can consequently arise. The objections as to limitation and recognition are equally fallacious. They are based on the assumption that upon the death of one of the two original grantees, the lessor became entitled to re-enter as to one-half of the property demised. This argument overlooks the elementary proposition that the lease would not terminate till the death of the survivor of the two lessees. There is a fundamental distinction between the question of the duration of the lease as a whole and the question of the devolution of the interest thereunder on the death of the first lessee. We are not now concerned with the question, whether upon the death of the first lessee, his heirs or his co-lessee would be entitled to occupy the demised premises. It is sufficient for our present purpose that the landlord was not entitled to re-enter till both the lessees were dead. In this view, no question of limitation or recognition arises.

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In my opinion, there is no escape from the conclusion that these appeals must be allowed, the decrees of the Subordinate Judge set aside and the suits decreed on the terms indicated in the judgment of the Chief Justice.

RICHARDSON J. I am of the same opinion, and there is nothing which I can usefully add to the judgments delivered by the Chief Justice and Mr. Justice Mookerjee.

S. M.

Appeals allowed.

APPENDIX.

Muqarrari.

The word "Muqurrari" is the passive participle (*nomen patientis*) of taqrir (verbal noun in the second Form of qrr). By adding to it the ya of *nisbah* or relation we get the word *Muqurrari*, which is an adjective.

The following extracts from standard Arabic, Persian and Urdu Lexicons sufficiently indicate the various meanings of the word relevant to our purpose —

I

A (Arabic) *Muqarrar*, established, confirmed, ratified, agreed upon, fixed, settled, ascertained, undoubted, certain, infallible, unquestionable, appointed, assigned, tribute, tax, impost, duty. A (common to both Arabic and Persian). *Muqarrari*, fixed tenure in perpetuity. A *Muqarrari-dar*, a holder of a tenure in perpetuity.

(A comprehensive Persian-English Dictionary by F. Steingass, p. D. p. 1292, col. b and p. 1293, col. a.)

II.

A *Muqarrar*, established, confirmed, ratified, fixed, ascertained, undoubted, certain, infallible, unquestionable, tribute, tax, impost, duty.

Persian, Arabic and English Dictionary by Richardson (Oxford, 1767. p. 1815).

III.

A *Muqarrar*, established, confirmed, ratified, agreed upon, fixed, settled, ascertained, undoubted, certain, infallible, unquestionable, appointed, tribute, tax, impost, duty.

A *Muqarrari*, fixed tenure in perpetuity.

(Dictionary, Persian, Arabic and English by Francis Johnson, London, 1852, p. 1229.)

IV.

A. P. Muqarrari, adj. fixed, appointed s. f. A fixed stipend, an appointment. adv. certainly.

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Muqarrari-dar.—The holder of a muqarrari farm—from Government.

(Dictionary, Hindustani and English by John Shakespeare, London, 1849, p. 1935.)

V.

Muqarrari f.—An appointment, a fixed tenure in perpetuity

Muqarrari-dar. m.—The holder of a Muqarrari tenure.

(Dictionary, Hindostani and English by Duncan Forbes, LL.D., London, 1866.)

VI.

P. Muqarrari, fixed, appointed, assigned, a fixed tenure in perpetuity, a fixed lease, quit-rent.

(A Dictionary of Urdu, Classical Hindi and English by John T. Platts, M.A., London, 1884, p. 1055)

VII.

Muqarrari n. f. (1) A fixed allowance, quit-rent, fixed lease (2) A, stipend.

(Hindustani-English Dictionary by T. W. Fallow, p. 1109.)

VIII.

Muqarrar—

1. Établi fermement.
2. Fixé et imposé à quelqu'un (impôt, tribut)
3. Redigé, Libellé.

(Dictionnaire Arabe-Français par A de Biberstein Kazimurski Tome II, p. 701, col. a.)

IX.

Muqarrari (Arabic) feminine noun (East) (1) Appointment. (2) Usual investment, fixed rent (Jama) transaction, revenue (Malguzari), tribute (Zari Khiraj). (3) Usual stipend, pittance, monthly allowance, salary, pay, wages. (4) Chuththa.

(Farhang-e-Asiyah, Vol IV by Sayyid Ahmed of Delhi, p. 387 It is regarded as the Standard Urdu Dictionary and was published under the auspices of H. H. the Nizam's Government.)

X.

تَذْرِيرُ الْإِنْسَانِ مَالَشْكُنِي - حَمَاءُهُ عَلَى الْأَقْوَارِ بِهِ - وَتَخْرِيرُ الشَّدِيْجِيَّةِ مَالَمَلَكِيَّةِ

مِيْ قَرَادِ - وَقَرِيدُ عَنْدَهُ الْبَزَرُ حَتَّى اسْتَقَدَّ

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The Sihah of Al-Jawhari, p. 287, Ed. Cairo.

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XI.

و بالمكان يقُرَّ بالفتح و لکس قراراً و قروراً و قراراً و تقرةً - ندت RAM NARAIN SINGH v. CHOTA NAGPUR BANKING ASSOCIATION. و سكن کاستقر و تقار و اقرة نبه و علبة و قررة * قاموس جاد اول مطبوع کامکته صفحه عرب ۴۰۰ Qāmūs, Vol. I, p. 634, Ed. Calcutta.

XII.

تقرير باقرار آوردن - بقال قررة علبة - و تقار بودن - بقال قررت عدد الخوار حتى استقر و قرار و گمات دادن * مد تهی الارب - مطبوع کامکته - صفحه ۱۵۷ *

Muntaha'l-Arab p. 2157, Ed. Calcutta.

XIII.

و قر (بالمكان) يقر - بالكسر و الفتح اى من حد ضرب و ملام - ذکرها ابن القطاع - وقال ابن سیده و الاولى آملي آئی انکثر استعمالاً . قراراً کسماب (و قروراً) کتفود (و قرا) بالفتح و تقرارة (و تقرة) الاخيرة شادة (بیت و سکن) فهو قار (کاستقر و تقار) و هو مستقر - و بقال فلان ما يتقار في مكانة اي مایستقر و اعمل تقار تقار ادامت الزراء في الراوه - وفي حديث آبی ذر قلم آنقار آن قمد آی لم المث او اقرة فية و علبة) اقرارا فاستقر (و قررة) . و قرر * ناج العروس من جواهر القاموس الجزء الثالث - مطبوع مصر . صفحه ۸۷ *

Tāju'l-'Arūs, Vol. III, p. 487, Ed. Cairo.

XIV.

و قر بالمكان يقو و يئر والولي اعلی قال ابن سددة اعلی اـ فعل يفعل هـذا انکثر من فعل يفعل قراراً و قروراً و قراراً و تقرارة و تقرة . والـ بـدرة شازة - و استقر و تقار - و اقرة نبه و علبة و قررة و اقرة في مكانة * لسان العرب الجزء السادس - مطبوع مصر - صفحه ۲۱۳ *

Lisānu'l-'Arab, Vol. VI, p. 393, Ed. Cairo.

XV.

فُورت الدَّائِنَةَ تَهْرِيزاً - رَصَتْ دَارِيَّا قُرْبَةَ قُرْبَةَ - إِيْ دَائِنَةَ دَائِنَةَ . قُرْبَةَ
فَلَوْنَا بِالْأَمْرِ حَمَدَهُ إِلَيْ الْأَقْوَادِ أَوْ مَلَى الْأَمْتَافِ بِهِ - وَلَدَنَا فِي الْمَكَانِ -
شَمَاءَ - وَالْعَامِلُ عَلَيْ عَوْلَ - تَزَوِّيْ فَارِزاً - فِيهِ - وَلَلَّادُ عَلَيْ السُّقْعِ حَمَلَهُ
صَقَّرَهُ حَمَلَهُ - سَذِيدَنَا لَهُ •

RAM NARAIN
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r.
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NAGPUR
BANKING
ASSOCIATION.

مُبَدِّطُ الْمُبَدِّطِ - جَلَدُ ثَانِي مُطَبِّدِعُ بَعْرَوْتٍ ١٦٨٧ *

Muhītu'l-Muhib, Vol. II, p. 1687, Ed. Beyrouth.

XVI.

الْأَوْبُ الْمَوَارِدُ - جَادَ ثَانِي مُطَبِّدِعُ بَعْرَوْتٍ - صَفَّحَةُ ١٨٢ *

Aqrabu'l-Mawārid, Vol. II, p. 982, Ed. Beyrouth.

XVII.

تَفَرِّجُ - نَاقْوَادُ أَوْدَنُ - دَنْتَارُ بَارِ بُودَنُ - بَقَالُ فُورَتُ شَنَدَهُ اسْخَنَدُ
حَاتِي اسْخَنَدُ - دَفَرَا اَوْدَنُ
صَرَاجُ جَادَ اَوْلَ - مَظَاهِعُ كَاكَنَهُ صَفَّحَهُ ١٠٣ *

Surāh, Vol. I, p. 461, Ed. Calcutta.

XVIII.

تَفَرِّجُ - سَسُ كَافَنُ وَ قَوَادُ دَادَنُ - وَ نَاقْوَادُ أَوْدَنُ - اَرْ مَنْتَجَبُ
وَبَرْ صَفَّمُ *
عِيَاثُ الْأَلْمَاتُ - مَظَاهِعُ كَاكَنَهُ - صَفَّحَهُ ١١٧ *

Ghuyāthu'l-Lughāt, p. 117, Ed. Lucknow.

Istimmārī.

The word *Istimmārī* is the verbal noun in the 10th form of *marr*. By the addition of it of the *ya* of *nishāt* or relation, we get the word *istimmārī*.

The following extracts from Standard Arabic-Persian and Urdu lexicons indicate its various meanings relevant to our purpose.

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A. *Istimirārī* (v. n.): Proceedings going on, persevering; persisting in one course, remaining, continuing, being able to bear, perpetuity. *Istimirārat mariratuhu e'alayhi*. His malice against him remained. A. *Istimirārī*, perpetual, continuative. (Dictionary Persian, Arabic and English by Francis Johnson, London. 1852, p. 83.)

II.

A. *Istimirār*, n. m. (1) permanence, perpetuity, preservation: (2) uninterrupted possession: (3) In law, a fixed rent not liable to alteration.

Istimirādar n, the holder of a farm or lease in perpetuity.

Istimirārī, adj. perpetual, continuative, never-ceasing.

Istimirārī, n. f. A piece of land on a fixed lease; land permanently settled: the Permanent Settlement of Lord Cornwallis.

Istimirārī patta. A lease or farm granted at a fixed rent; a lease in perpetuity.

Istimirārī patte dar n, m. Holder of a lease of land at a fixed rent

Istimirārī-muqarrīlana, to fix in perpetuity.

Istimirārī bandobust, *bandobust-i-istimirārī* n. m. Permanent Settlement.

(Hindustani English Dictionary by S. W. Fallon, p. 87.)

III.

A. *Istimirār* (1) Perseverance, continuation, persisting, constancy, continuation, (2) proceeding, going on; (3) prolongation; (4) departure passing away

(Persian, Arabic and English Dictionary by Richardson, Oxford, 1767 A. D., p. 109)

IV.

Istimirārī, perpetual, permanent.

Istimirārī Jam, fixed or perpetual assessment of rent.

Istimirārī jöt, a fixed or perpetual tenure.

Istimirārī Mäl Guzārī, permanent or perpetual revenue.

Istimirārī patta, a perpetual lease of a farm.

Istimirārī pattudar, the holder of a lease of lands at a permanent rent.

(Dictionary, Hindustani and English by Duncan Forbes LL.D. 1886, London.)

V.

A. *Istimirār* (v. n.). S. M. continuation, perseverance, perpetuity, uninterrupted tenure of possession.

A. *Istimirārī*, adj. continuative, perpetual.

(Dictionary, Hindustani and English and English and Hindustani by John Shakespeare, London, 1849 A. D., p. 109.)

VI.

A. Istimrārī, adj. continuative, perpetual, permanent, unceasing, land rented on a fixed lease; land permanently settled, the permanent settlement.

(A Dictionary of Urdu Classical Hindi and English by John T. Platts. M. A., London, 1884, page 50).

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VII.

Istimrār 1. N. d'act de la x 2 Duree, Continuation, persistence.

(Dictionnaire Arabe Francais par A. DeBiberstein Kazimirski Tome II, page 1085).

VIII.

A. ایستمروار (istimrārī) (V. N. 10 of میرار), continuation, continuance, perseverance, perpetuity, permanence, fixed rent, not liable to alteration.

A. ایستمرواردار (istimrardar), Holder of a farm or lease in perpetuity.

A. ایستمرواری (istimrārī), perpetual continuative

(Persian-English Dictionary, by H. Steingass, Ph. D., London, page 55.)

IX.

مُرْ عَلَيْهِ دَوْ بَعْدَ صَوْ - اَيْ اَجْدَرْ - وَ مُرْ بَعْدَ حَدَّا دَوْرَا -
دَهْبَ وَ سَتْمَرْ مَكْلَهْ - وَ بَقَالْ اَهَّا اَسْتَمَرْ مَوْرِيَهْ - اَيْ اَسْتَكْمَرْ مَوْرِيَهْ *
صَفَّاجْ اَلْبَرْدَهْ مَطْدُوْهْ مَهْرَوْ - عَصَفَهْهَهْ ۱۱۴

X

وَ مَهْرَوْ دَوْ مَهْرَوْ - جَاهْ - دَهْبَ بَلْسَمَهْ - وَ اَسْتَمَرْ - مَهْنِي مَلَهْ
طَبِيعَهْ وَاحِدَهْ - وَ دَلْشِي قَوَى عَلَى حَمَادَهْ *
قَامِسْ - حَادَ اولْ - مَطْدُوْعَ كَلَكَهْ مَهْنِهَهْ ۱۵۰ *

XI.

سَتْمَهَارْ - اَذْشَقْ - وَ زَانَ بَيْهَمَهْ - وَ بَرِيبَ رَدَشَ رَفَانْ -
مَهْبِشَكْ كَرَدنْ *

* ۲۵۸ اَلْبَرْ - حَادَ رَاعَ - مَطْدُوْعَ كَلَكَهْ - مَهْنِهَهْ ۱۵۰

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XII.

RAM NARAIN SINGH CHOTA NAGPUR BANKING ASSOCIATION (امر) عليه يمـر اسـمـاـ مـرـدـاـ جـادـرـ مـرـدـاـ دـ مـرـدـاـ (ذـبـ كـاسـمـرـ) وـ مـالـ اـنـ مـيـدـدـهـ مـرـدـاـ يـمـرـ مـرـدـاـ دـ مـرـدـاـ - جـاءـ دـ هـبـ (وـ اـنـمـرـ) الشـ (مضـيـ عـلـ طـرـيقـةـ وـاحـدـةـ) (دـ) اـسـمـرـ (بـالـشـيـ قـوـىـ عـلـ حـمـاهـ) *

تـاجـ الـمـرـدـسـ مـنـ حـواـهـوـ الـقـاـوـسـ مـطـبـوعـ مـصـرـ - الـجـزـءـ الـثـالـثـ صـفـحـةـ ٥٣٧ـ *

XIII.

مـرـ عـلـيـهـ بـهـ يـمـرـ مـرـاـ آـيـ اـحـقـازـ - دـ مـرـ يـمـرـ مـرـاـ مـرـدـاـ - ذـبـ دـ اـسـمـرـ مـلـلـهـ وـ اـسـمـرـالـشـيـ - مـضـيـ عـلـ طـرـيقـةـ وـاحـدـةـ - وـ اـسـمـرـالـشـيـ قـوـىـ عـلـ حـمـاهـ *

لـسـ الـعـرـ الـجـزـءـ الـسـابـعـ - مـطـبـوعـ مـصـرـ - صـفـحـةـ ١٠ـ دـ ١١ـ *

XIV.

دـ سـنـمـرـ الـرـجـلـ اـسـمـوـرـاـ - جـادـ دـ هـبـ - دـ الشـيـ دـامـ وـ ثـدـ اـمـارـدـ - دـ مـضـيـ عـلـ طـرـيقـةـ وـ حـاجـةـ وـاحـدـةـ - وـ مـنـهـ مـذـكـرـةـ مـسـنـمـرـةـ - وـ اـسـمـرـالـشـيـ قـوـىـ عـلـ حـمـاهـ - دـ اـسـمـرـ بـهـ عـلـ وـلـاـيـةـ قـرـرـةـ مـاـيـهاـ . ثـدـقـةـ فـهـ *

مـسـرـوـطـ اـسـمـيـطـ جـادـ ثـانـيـ - مـطـبـوعـ بـدـرـوتـ صـفـحـةـ ١٩٦٥ـ *

XV.

دـ قـرـبـ الـمـوـاـدـ جـادـ ثـانـيـ - مـطـبـوعـ بـدـرـوتـ صـفـحـةـ ١١١ـ *

XVI.

اسـمـوـرـ - اـسـتـوـارـ شـدـرـ - بـقـالـ اـسـمـوـرـ مـرـيـةـ آـيـ اـسـتـحـكـمـ - دـ رـفـقـسـ بـهـوـسـةـ *

مـرـاحـ - مـطـبـوعـ كـلـكـةـ صـفـحـةـ ١٦٣ـ *

XVII.

اسـمـوـرـ - رـوـانـ شـدـنـ - دـ دـمـيـشـهـ فـوـرـ - اـنـ مـلـلـعـبـ وـ مـوـدـسـ الـاعـاتـ *

عـيـاثـ الـالـفـاتـ - مـطـبـوعـ لـذـمنـ - صـفـحـةـ ٢٧ـ *

PRIVY COUNCIL.

RAVANESHWAR PRASAD SINGH

v.

CHANDI PRASAD SINGH.

P.C.
1915

Nov. 1, 2.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Alienation by widow—Legal necessity—Onus of proof of legal necessity as affected by lapse of time—Proof of custom of succession to estate—Limitation—Adverse possession—Res judicata.

On this appeal their Lordships of the Judicial Committee affirmed the decision of the High Court which is reported in I. L. R. 38 Calc. at page 725.

APPEAL, No. 1 of 1914, from a judgment and decree (29th March 1911) of the High Court at Calcutta which varied a judgment and decree (14th April 1909) of the Court of the Subordinate Judge of Monghyr.

The defendant was the appellant to His Majesty in Council.

The question for determination in this appeal was whether the respondents were entitled to recover possession from the appellant with mesne profits of part of a zamindari (known as the Chakai Estate) in the Moughyr District, to which they claimed that one or other of them had title as revisionary heir of the last male owner.

The facts are fully set out in the report of the appeal to the High Court (WOODROFFE and CARNDUFF JJ.) which will be found in I. L. R. 38 Calc. 721.

The estate formerly belonged to Tekait Fatteh Narayan Singh who died about 1863 leaving him

* Present. Viscount HALDANE, LORD PARNOOR, LORD WRENBURY,
SIR JOHN EDGE, AND MR. AMEER ALI

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the transactions, and that they are binding on the reversioners. The appellant was not bound to show that Durga Kumari made a proper application of the borrowed money in accordance with her representations: Mayne's Hindu Law, 8th Ed., page 853, paragraph 635 was referred to. The Subordinate Judge was wrong in finding that the only evidence of legal necessity consisted "of the statements of the witness Chao Lal, and the recitals in the documents" challenged. As to *res judicata*, reference was made to the previous litigation concluding with the Privy Council case of *Doorqa Persid Singh v. Doorqa Konwari*(1).

Sir H. Erle Richards, K. C. and *B. Dubé*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by
Nov. 2. **VISCOUNT HALDANE.** In this appeal their Lordships see no reason to delay their recommendation to His Majesty.

The case has been very fully opened, and, on the points argued, their Lordships do not find any reason to differ from the conclusions arrived at by the High Court.

They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: *Downer & Johnson.*

Solicitors for the respondents: *Watkins & Hunter.*

J. V. W.

(1) (1878) I L. R. 4 Calc. 190 ; L. R. 5 I. A. 119

APPELLATE CRIMINAL.

Before Chitty and Walmsley JJ

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v.

Dec. 20.

EMPEROR.*

Forgery—Signing certificate of purchase of arms and ammunitions in false names and giving wrong addresses—Person legally entitled to possess the same—Act “fraudulent” if not “dishonest”—Penal Code (Act XLV 1860) ss. 23, 24, 403 to 405

A person lawfully entitled to possess arms and ammunition signing the prescribed certificate of purchase of the same in the name of another with an address not his own, and thereby deceiving the gunsmith and the Government and defeating the object of the certificate, commits forgery his act having been done “fraudulently,” if not “dishonestly.”

Reg. v. Toshacil (1), *Empress v. Dhunum Kazee* (2) and *Queen-Empress v. Abbas Ali* (3) followed.

ON the 1st April 1915 the appellant, an European lad of 15 or 16 years, purchased from Messrs. Rodda & Co., in the town of Calcutta, a revolver and 50 cartridges and signed the upper portion of the certificate of purchase in the name and address of “C. O.—24-1, Ripon Street.” On the 1st and 8th July 1915 he made two similar purchases of a revolver and 100 cartridges from Messrs. Walter Locke & Co., and a revolver and 25 cartridges from Messrs. Lyon and Lyon, both local gunsmiths, and signed the same portion of the certificate in the names, with the addresses, of P. L. M.—56, Ripon Street and “R. S.—Banali Indigo Factory, Bhagalpore,” respectively.

*Criminal Appeal, No. 921 of 1915, against the order of J. Cam-II, Offg Presidency Magistrate, Southern Division, Calcutta, dated 16 Dec. 1915.

(1) (1845) 1 Den. C. C. II. 492. (2) (1842) I. L. R. 9 Calc. 53.

(3) (1897) I. L. R. 25 Calc. 512.

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It appeared that gun dealers have to deposit with the Customs authorities the sum of Rs. 15 for every revolver imported by them, that an intending purchaser, if requiring arms or ammunitions for his own use, has to sign the upper portion of a certificate of purchase with his address, stating the purpose for which the arms and ammunitions are required. A transcript of the certificate is sent to the Arms Act Department, which verifies it through the local police. If the arms, etc., are found to be in the possession of a person legally entitled to hold them and his name and address have been correctly given, the police report verification to the Customs authorities, and the dealer is entitled to a refund of the Rs. 15 less an *ad valorem* duty of 10 per cent., though sometimes the refund is made in anticipation of the police verification, but subject to return, if the verification has failed. There was evidence that the deposits made by the three firms in respect of the revolvers sold to the appellant had been declared by the Collector to have been forfeited by reason of the appellant's action in giving wrong names and addresses. Both *C.O.* and *P.L.M.* were examined at the trial and denied having authorized the appellant to purchase any revolvers or cartridges for them. *R.S.* of Bhagalpore was not called, and there was nothing to show whether there was any such real person. The witnesses examined from the above firms stated that they understood that the articles were purchased by the appellant for his own use, and that otherwise they would have required a letter of authority from the real purchasers, but they admitted that if the appellant had bought the revolvers and cartridges in his own name, he would have got them without any difficulty. None of the revolvers or cartridges were found in the house of the appellant when searched, and he refused to disclose what he had done with them.

The appellant was tried by the Second Presidency Magistrate on charges under ss. 417, 465 and 471 of the Penal Code in respect of each of the three purchases made by him, but on objection being taken on the ground of misjoinder, during the argument on the case, the Magistrate struck out the charge under s. 417, giving the appellant an opportunity of recalling the prosecution witnesses for cross-examination which he, however, declined. He was convicted, on the 16th September 1915, on the three charges under s. 465, and sentenced to eight months' rigorous imprisonment on each count. His appeal to the High Court was admitted on the question of sentence only, but was ultimately heard on the merits.

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Mr. Eardley Norton (with him *Babu Santosh Kumar Bose*), for the appellant. The appeal was admitted only on a question of sentence, but I am entitled to be heard on the merits. The appellant filled in the upper portion of the certificates in the names and addresses of others, and the question is whether this amounts to forgery within sections 463 and 464 of the Penal Code. His intention was not to make the firms part with the arms, as he could have got them in his own name, but only to avoid being traced in possession of them. This is not a criminal intention. Refers to Mayne's Criminal Law, 3rd Edition, p. 818. The document was not a false one: *Queen v. Martin* (1), *Reg. v. Inder* (2). The cases cited by the Magistrate, *Queen-Empress v. Abbas Ali* (3) and *Empress v. Dhunum Kazee* (4), are distinguishable. In the first the accused could not have got the appointment without the certificate, and in the other there was guilty knowledge or intention, which is absent here. It is

(1) (1879) 5 Q. B. D. 34.

(3) (1897) I. L. R. 25 Calc. 512.

(2) (1848) 1 D. & C. C. R. 325.

(4) (1882) I. L. R. 9 Calc. 53.

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It appeared that gun dealers have to deposit with the Customs authorities the sum of Rs. 15 for every revolver imported by them, that an intending purchaser, if requiring arms or ammunitions for his own use, has to sign the upper portion of a certificate of purchase with his address, stating the purpose for which the arms and ammunitions are required. A transcript of the certificate is sent to the Arms Act Department, which verifies it through the local police. If the arms, etc., are found to be in the possession of a person legally entitled to hold them and his name and address have been correctly given, the police report verification to the Customs authorities, and the dealer is entitled to a refund of the Rs. 15 less an *ad valorem* duty of 10 per cent., though sometimes the refund is made in anticipation of the police verification, but subject to return, if the verification has failed. There was evidence that the deposits made by the three firms in respect of the revolvers sold to the appellant had been declared by the Collector to have been forfeited by reason of the appellant's action in giving wrong names and addresses. Both *C.O.* and *P.L.M.* were examined at the trial and denied having authorized the appellant to purchase any revolvers or cartridges for them. *R.S.* of Bhagalpore was not called, and there was nothing to show whether there was any such real person. The witnesses examined from the above firms stated that they understood that the articles were purchased by the appellant for his own use, and that otherwise they would have required a letter of authority from the real purchasers, but they admitted that if the appellant had bought the revolvers and cartridges in his own name, he would have got them without any difficulty. None of the revolvers or cartridges were found in the house of the appellant when searched, and he refused to disclose what he had done with them.

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Mr. Eardley Norton (with him *Babu Santosh Kumar Bose*), for the appellant. The appeal was admitted only on a question of sentence, but I am entitled to be heard on the merits. The appellant filled in the upper portion of the certificates in the names and addresses of others, and the question is whether this amounts to forgery within sections 463 and 464 of the Penal Code. His intention was not to make the firms part with the arms, as he could have got them in his own name, but only to avoid being traced in possession of them. This is not a criminal intention. Refers to Mayne's Criminal Law, 3rd Edition, p 818. The document was not a false one: *Queen v. Martin* (1), *Reg. v. Inder* (2). The cases cited by the Magistrate, *Queen-Empress v. Abbas Ali* (3) and *Empress v. Dhunum Kazee* (4), are distinguishable. In the first the accused could not have got the appointment without the certificate, and in the other there was guilty knowledge or intention, which is absent here. It is

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(2) (1848) 1 Den. C. C. R. 325.

(4) (1882) 1. L. R. 9 Calc. 53.

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not shown that the appellant knew about the deposit or its forfeiture.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown. There was an intention to commit fraud by making the firms part with the revolvers and cartridges which they would not have done if they had known he was giving wrong names and addresses. The fact of giving false names shows guilty knowledge: *Emperor v. Wyndham* (1), *Queen-Empress v. Abbas Ali* (2) and *Empress v. Dhunum Kazee* (3). The document was a false one, as it was signed in an assumed name, and it is immaterial that he could have got the arms in his own name: *see Halsbury's Laws of England*, Vol. IX, p. 729, *Reg. v. Toshack* (4), *Rex v. Marshall* (5), *Rex v. Francis* (6), *Rex v. Whiley* (7).

Babu Santosh Kumar Bose, in reply. Intention to commit fraud must be proved *aliunde*. In the English cases cited for the Crown such intention was specifically found.

Cur. adv. vult.

CHITTY AND WALMSLEY JJ. In this case the appellant, P. L. Causley, was found guilty on three charges under section 465 of the Indian Penal Code and sentenced to two years' rigorous imprisonment, *i.e.*, eight months on each charge. The appellant is stated in the Magistrate's judgment to be a lad of 16 or 17 years of age. We are told by his mother that he is only 15. The appeal was admitted on the question of sentence, but has been argued before us also on the question of law arising in the case. The facts are not in dispute. They are fully set out in the judgment of the

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| (1) Unreported. | (4) (1845) 1 Deo. C. C. R. 492. |
| (2) (1897) I. L. R. 25 Calc. 512. | (5) (1804) Russ. & Ry. 73. |
| (3) (1862) I. L. R. 9 Calc. 53. | (6) (1811) Russ. & Ry. 209. |
| (7) (1805) Russ. & Ry. 90. | |

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Magistrate and need not be re-stated here. The question is whether the signing of the certificates in a false name and giving in each case an address, which was not his, amounts to forgery on the part of the appellant. It may be that the action of the appellant was not "dishonest," taking that word in the sense ascribed to it by the Indian Penal Code, sections 23 and 24. There can, however, be no doubt he acted "fraudulently." His intention was undoubtedly to deceive both the firms, who sold him these revolvers and ammunition, and also the Government, which has prescribed the formalities to be observed in such cases. He must be taken to have known that the certificate was required for the identification of the purchaser and the weapons purchased. This purpose he definitely defeated by his action in making out false certificates. His acts come directly within the definition of forgery as contained in sections 463 and 464 of the Indian Penal Code. The cases of *Reg. v. Toshack* (1), *Empress v. Dhunum Kazee* (2), and *Queen-Empress v. Abbaq Ali* (3), are in point and support the view which we take in this case. The conviction must, therefore, be upheld.

With regard to the sentence we take into consideration the extreme youth of the appellant. On the other hand, the offence is a very serious one and it has been aggravated in his case by the fact that he has declined to give any information regarding the revolvers purchased by him, or the use to which they have been put. We think, however, that he will be sufficiently punished if he be kept in jail for one year, that is to say, for four months on each charge, and we reduce the term of imprisonment accordingly.

E. H. M.

Conviction upheld.

- (1) (1813) 1 Iow. C. C. R. 422 (2) (1822) 1 L. R. 905; 51.
 (3) (1827) 1 L. R. 25 C. 1. 512

ORIGINAL CRIMINAL.*Before Sanderson C.J.*

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March 8.**EMPEROR***v.***SREENATH MAHAPATRA.***

Right of Reply—Exhibiting documents, not part of the record, on behalf of the accused during the cross-examination of the prosecution witnessess
—Doctrine of surprise—Criminal Procedure Code (Act V of 1898), ss. 289 and 292.

Section 292 of the Criminal Procedure Code is not to be read independently but in connection with s. 289, and gives a right of reply only when the accused, or any of them, adduces evidence after the case for the prosecution has concluded.

The prosecution has no right of reply when the counsel for the accused has, during the cross-examination of a prosecution witness and before the close of the case for the Crown, put certain letters, which do not form part of the record, to such witness, and then tendered and had them admitted in evidence.

The question whether the prosecution has been taken by surprise is not the correct test under s. 292 of the Code.

THE three prisoners, Sreenath Mahapatra, Anil Prokash Shome and Sunil Prokash Shome, were tried at the first Criminal Sessions of the High Court before the learned Chief Justice and a jury. The third prisoner, Sunil, had been employed in the firm of McLeod & Co., who are managing agents for various railways, as a typist on a salary of Rs. 30 per month. On 10th December 1915 he took a forged letter, purporting to be signed by McLeod & Co., and requesting the delivery to bearer of a cheque book on behalf

of the Burdwan-Cuttwa Railway, to J. M. Hartley, the Examiner of Government Railway Accounts (E. I. R.). A cheque book, No. 2181, containing 50 blank forms was thereupon despatched by Hartley, in a cover through his peon addressed to McLeod & Co. Sunil accompanied the peon and on arrival at McLeod & Co.'s office took the peon book with its enclosure into a room, came out shortly after and returned the peon book with some illegible initials. On the next day the first and third prisoners, Sreenath and Anil, went together to the Bank of Bengal, and the former presented to the Bank clerk a cheque for Rs. 12,500 purporting to have been drawn in favour of one M. C. Bhowmik or bearer against the Burdwan-Cuttwa Railway. This cheque was taken from the book No. 2181, issued by Hartley the day previous. The Bank authorities communicated with McLeod & Co., and discovered the cheque to be a forgery. Sreenath and Anil were taken into custody and the police next arrested Sunil and, on search, found in his house the book, No. 2181, with a form corresponding to the forged cheque missing.

The prisoners were charged with criminal conspiracy to commit forgery for the purpose of cheating, fraudulently and dishonestly using as genuine a forged document, cheating and certain other offences.

During the cross-examination of two of the prosecution witnesses, Mr. Thornton, counsel for Sunil, put to the witnesses for identification certain letters, which were not on the record, sent up by the Magistrate to the High Court, as having been written by them or their employers, and tendered them in evidence and had them exhibited for the defence. At the close of the case for the prosecution, the counsel for the prisoners stated that they did not intend to call witnesses or adduce evidence, whereupon

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EMPEROR Mr. Norton, counsel for the prosecution, claimed to have the right of reply.

SREENATH MAHAPATRA. [SANDERSON C. J. The onus is on you, Mr. Norton, to show that you have a right of reply.]

Mr. Eardley Norton, (with him *Mr. McNair* instructed by *Mr. J. T. Hume*, Public Prosecutor), for the Crown. Section 292 of the Code of 1882 was altered by the present Code. Sections 289 and 292 are wholly independent of each other, and s. 292 must be read by itself and as controlling s. 289. Refers to *Emperor v. Bhaskar Balwant Bhopatkar* (1) and *Emperor v. Timol* (2) where the question whether the prosecution is taken by surprise is laid down as the test. Beauman J. took a different view in *Emperor v. Abdulali Sharfali* (3).

Mr. L. Thornton, for Sunil. Section 292 must be read with s. 289. The words "*adduce any evidence*" in s. 292 refer to evidence let in by the accused under s. 290. Section 292 is not a wholly independent section. The prosecution has the right to sum up after the close of its case, and may then deal with the documents put in by the accused during the cross-examination of the Crown witnesses.

Cur. adv. null.

SANDERSON, C.J. In this case the three prisoners (Sreenath Mahapatra, Anil Prokash Shome and Sunil Prokash Shome) were charged with criminal conspiracy to commit the offences of forgery for the purpose of cheating, fraudulently and dishonestly using as genuine a forged document and cheating, and certain other offences, which it is not necessary to specify in detail.

(1) (1906) I. L. R. 30 Bom. 421 (2) (1906) 10 C. W. N. ccxvii.

(3) (1909) 11 Bom. L. R. 177.

During the cross-examination of certain of the witnesses for the prosecution, the learned counsel appearing for one of the prisoners put to the witnesses certain letters as having been written by them or their employers.

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The witnesses identified the letters which were then tendered as evidence and admitted.

At the end of the case for the prosecution, the learned counsel for all the three prisoners declared that they did not mean to call witnesses or adduce evidence.

The learned counsel for the prosecution thereupon claimed the right to reply under section 292 of the Code of Criminal Procedure of 1898, alleging that one of the accused had adduced evidence, by reason of the letters which the learned counsel appearing for him had put in during the cross-examination of the witnesses for the prosecution, and, therefore, that the terms of section 292 gave him a right of reply. I held that the learned counsel for the prosecution had not, under the circumstances above mentioned, the right to reply, and at the request of the learned counsel engaged in the case, who urged that it was desirable to have a definite ruling on the point, I undertook to put my reasons for so holding into writing.

In my judgment the question depends upon whether section 292 is to be construed independently of the preceding sections of the Act, or whether it must be read in connection with them and in particular with reference to section 289.

If section 292 is to be construed independently of section 289, then the putting in evidence of the letters by the learned counsel for one of the accused during the cross-examination of the witnesses for the prosecution would, in my opinion, bring the case within

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the section and give the prosecution the right of reply: for I do not think that the correct test for deciding this matter is whether the prosecution is taken by surprise, as has been suggested in some of the decisions. There is nothing to this effect in section 292, and to hold that this was the test would mean the implied addition to the section of some such words as "provided that the Judge who tries the case thinks the prosecution has been taken by surprise by the evidence adduced by any of the accused."

Such an implication, in my judgment, is not permissible or necessary.

In my judgment, however, section 292 must be read in connection with section 289 and must be construed accordingly. When so read, the intention of the Legislature to my mind is clear. The scheme of the Act is that at a certain stage of the proceedings, *viz.*, "when the examination of the witnesses for the prosecution and the examination of any of the accused are concluded," the question is to be put to the accused whether he means to adduce evidence. If the accused does not then adduce evidence, provisions as to the course to be adopted are made by the Act: if he does, then certain other provisions as to the course to be adopted are made, one of which is the provision contained in section 292 as to the right of reply. Reading, therefore, the two sections together the right to reply which is given by section 292 arises only if the accused or any of the accused takes advantage of the right to adduce evidence at the time and in the manner specified by the Act, *viz.*, after the case for the prosecution is concluded.

The object of the Legislature, in my opinion, being to give each side an opportunity of commenting on the evidence of the other, this is accomplished by giving the prosecution the right to sum up at the

conclusion of the case for the prosecution, when the accused does not adduce evidence in the sense above-mentioned, but confines himself to getting in certain facts or documents by the legitimate employment of the cross-examination of the witnesses for the prosecution, and in giving a right of reply to the prosecution when the accused does adduce evidence in the manner specified by the Act. It is to be noted that this should not give rise to any inconvenience, for, in the cases where documents are put in by means of legitimate cross-examination of the witnesses for the prosecution, it must be obvious to those conducting the case for the prosecution for what purpose or with what object they are put in, and the prosecution will have an opportunity of commenting upon them in the summing up which is expressly provided by the Act at the conclusion of the case for the prosecution. For these reasons, I held that the learned counsel for the prosecution in this case had not the right to reply.

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v.

Oct. 19, 20;
Nov. 15.

AMARENDR A NATH DEY.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Will—Construction of will—Contingent bequest in futuro of whole estate—Succession Act (X of 1865), ss. 107, 111—Event on occurrence of which distribution was to take place, specified in will.

The will of a Hindu resident in Calcutta and subject to the Dayabhaga School of law, who died on 10th November 1907, stated, "I appoint my wife Poritoshini Dasi to be the sole executrix of this my will. I hereby authorise my said wife to adopt *dattaka putra*. In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son, or if such adopted son predeceases her without leaving any male issue in such case my estate after the death of my said wife shall pass to the sons of my sister Benodini Dasi who may be living at the time of my death." Two sons of his sister were living at the death of the testator. On his death his widow as executrix duly obtained probate of the will, and in August 1909, in pursuance of the authority given her by her deceased husband, she adopted a son who, however, died on 10th March 1910, an infant unmarried and living no male issue; and a few days afterwards the widow herself died. In a suit by the adoptive mother of the testator, now represented by the appellants, against the two sons (the present respondents) of his sister, for a declaration that in the events that had happened the devise to them had failed, and that the testator's estate had devolved on her.

Held, on the construction of the will (affirming the decisions of the Courts in India), that on the death of the testator the widow took an interest in the estate which by virtue of the probate was not devested on her adoption of a son to her husband, and on her death the executory bequest to the sons of the testator's sister took effect and the estate passed to them.

* Present: VISCOUNT HALDANE, LORD PARMOOR, LORD WRENBURY,
SIR JOHN EDGE AND MR. AMFEE ALI.

Section 111 of the Succession Act (X of 1865) was not applicable because the event on the occurrence of which the distribution was to take place was distinctly mentioned as, in the words of the will, "the death of my wife," and the gift to the testator's nephews was therefore not affected by that section.

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APPEAL 86 of 1914 from a decree (28th November 1913), of the High Court at Calcutta on its Appellate Side affirming a decree (19th June 1912) of the same Court sitting in the exercise of its ordinary original jurisdiction.

The plaintiffs were the appellants to His Majesty in Council.

The principal question in this appeal is as to the validity of a bequest in favour of the respondents contained in the will dated 26th June 1898 of one Heramba Nath Ghose who died on 10th November 1907 leaving as his sole heir according to Hindu Law his widow, Paritoshini Dasi.

The facts of the case and the will to be construed are fully set out in the report of the appeal before the High Court (SIR LAWRENCE JENKINS, C. J., and WOOD-ROFFE J.) which will be found in I. L. R. 11 Calc. 612, where the judgment of the Original Court (FLETCHER J.) is also set out.

On this appeal,

Sir R. Finlay, K.C., Upjohn, K.C., Sir W. Garth, and A. M. Dunne, for the appellants, contended that there was no previous gift to the respondents in the will, and therefore the bequest did not take effect; it was a bequest contingent on the happening of a "specified uncertain event," and that event did not happen "before the period when the fund bequeathed is payable or distributable"; reference was made to section 111 of the Indian Succession Act which was made applicable to Hindus by the Hindu Wills Act

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(XXI of 1870). In the absence of a gift by implication or otherwise to either the widow or the adopted son, the latter took the estate by inheritance, and not by devise, and that estate could not be subsequently devested. According to Hindu Law the succession vested immediately on the death of the last owner, and could not remain in abeyance; and a gift of a contingent executory interest only, not preceded by any prior gift, was unknown to the Hindu Law, and was inoperative and void. The vesting of the estate in the widow as executrix for administrative purposes could not, it was submitted, affect its devolution according to law, or validate any such contingent executory interest; and in any case the widow's right as executrix ceased when she adopted a son. On the construction of the will the bequest to the respondents was bad under the provisions of section 111, for it was intended to take effect, if at all, on the happening of one of two specified uncertain events, namely, the death of the widow without having made an adoption, or the death of the adopted son without leaving male issue, and no time was mentioned in the will for the occurrence of these events, and neither of them happened before the period when the fund was distributable, namely the death of the testator. The following cases and authorities were cited and discussed : *Narendra Nath Sircar v. Kamalbasini Dasi* (1), Succession Act section 107, *Amrito Lall Dutt v. Surnomoni Dasi* (2), *Tugore Case* (3), *Soorjeemoney Dassee v. Denobundoo Mullick* (4), *Bhoobunmoyee Debia v. Ram Kishore Acharj Chowdhry* (5), *Beer-pertab Sahoo v. Rajender Pertab Sahoo* (6), *Kally*

- (1) (1896) I. L. R. 23 Calc. 563; (4) (1862) 9 Moo. I. A. 123, 135.
 L. R. 23 I. A. 18. (5) (1865) 10 Moo. I. A. 279, 281,
 (2) (1898) I. L. R. 25 Calc. 662, 690. 311.
 (3) (1872) I. R. I. A. Sup. Vol. 47; (6) (1867) 12 Moo. I. A. 1, 37.
 9 B. L. R. 377.

Prosonno Ghose v. Gocool Chunder Mitter (1), *Bai Motivahu v. Bai Mamubai* (2), *Gordhandas Soonderdas v. Bai Ramcoover* (3), Mayne's Hindu Law (8th Ed.) page 509, paragraph 376, Succession Act, section 111, Illustrations (b) and (c), *Manikyamala Bose v. Nando Kumar Bose* (4), Mayne's Hindu Law (8th Ed.) page 869, paragraph 624, and Trevelyan on Hindu Wills, page 118. The language of the will did not, it was submitted, amount to a direction that the period of distribution should be the death of the widow. [LORD WRENBURY Section 111, does not apply if a period is specified in the will within which the contingent event is to happen, and the will seems to me to show that the testator does fix such a period by the words "after the death of my wife." LORD HALDANE said their Lordships were favourably impressed with what Lord Wrenbury said, and they would like to hear what the respondents had to say on the question of section 111].

De Gruyther, K.C., and *B. Dube*, for the respondents, contended that section 111 was a law as to the construction of wills, and not one placing any restrictions on the testator: reference was made to illustrations (b) and (e). In the case of *Narendra Nath Sircar v. Kamalbasini Dasi* (5), the provision in the will "my three sons shall be entitled, etc." gave rise to the exact case in illustration (b) of section 111. As to that case, therefore, the section says what is to be the construction of the will, and it can only be construed under the Act. In *Radha Prasad Mullick v. Raneemani Dassi* (6), a fixed period is

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| (1) (1877) I L.R. 2 Calc 295. | (5) (1896) I L.R. 23 Calc 563, 571. |
| (2) (1897) I L.R. 21 Bom. 702, 720. | I.L.R. 23 I.A. 18, 24 2A. |
| L.R. 24 I.A. 93, 101 | (6) (1908) I.L.R. 35 Calc 896 902 |
| (3) (1901) I.L.R. 26 Bom. 449, 467. | I.R. 35 I.A. 118, 125 |
| (4) (1903) I.L.R. 33 Calc 1306, 1313 | |

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specified. In the present case the time fixed is "after the death of my wife." The point was considered in *Chunilal Parvati Shankar v. Bai Samrath* (1). Section 111 only applies to cases where the testator has not in the will expressly fixed a period within which the uncertain event is to happen, that is where he has left it ambiguous; but in the present case the testator has so fixed it, and therefore the section does not apply: see section 107 (as to the date of vesting when a legacy is contingent on a specified uncertain event). The judgment of Trevelyan J. in *Amrito Lall Dutt v. Surnomoni Dasi* (2), and that of Russell J. in *Gordhandas Soonderdas v. Bai Ramcoover* (3), dispose of the propositions put forward for the appellant. Reference was also made to *Bai Motirahu v. Bai Mamubai* (4): "It is too late to say, etc"; and *Kally Prosonna Ghose v. Gocool Chunder Mitter* (5). The bequest was good and valid, and, in the events that had happened the respondents were entitled to the estate.

Sir R. Finlay, K. C., in reply. Assuming that there is no devise to the respondents, there is no gift to them, for no gift is good without possession. The adopted son takes by succession on the supposition that the testator has begotten him; he is in the place of a natural son. Reference was made to *Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (6) [MR. AMEER ALI referred to page 309 of the report of that case]. *Bai Motirahu v. Bai Mamubai* (7), and Mayne's Hindu Law (8th Ed.) page 509, paragraphs 376, 377. [D: *Gruyther, K. C.*, referred to *Kalidas*

(1) (1914) I.L.R. 38 Bom. 399, 411. (5) (1877) I.L.R. 2 Calc. 295.

(2) (1898) I.L.R. 25 Calc. 662. (6) (1865) 10 Moo. I.A. 279, 307.

(3) (1911) I.L.R. 26 Bom. 449. (7) (1897) I.L.R. 21 Bom. 709;

(4) (1897) I.L.R. 21 Bom. 709, 721; I.L.R. 24 I.A. 97.

I.L.R. 24 I.A. 97, 104.

Mullick v. Kanhaya Lal Pundit (1) to the effect that a gift might be good without possession].

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The judgment of their Lordships was delivered by

15. MR. AMEER ALI. This is an appeal from a judgment and decree of the High Court of Calcutta pronounced in a suit which relates to the will of one Heramba Nath Ghose, a Hindu inhabitant of the town of Calcutta, subject to the Dayabhaga School, who died on the 10th of November 1907.

The material portion of the will, which bears date the 26th June 1898, is in the following terms :—

"This is the last will and Testament of me Heramba Nath Ghose of No. 45, Pathuriaghata Street, Calcutta, son of Girindra Chunder Ghose, deceased zamindar. I revoke all prior testamentary writings and appoint my wife Srimati Paritoshini Dasi to be the sole executrix of this my will. I hereby authorize my said wife to adopt Dattaka putra. In case of death of an adopted son my said wife shall adopt on after another five sons in succession. If my said wife dies without adopting a son, or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Srimati Benodhri Dasi who may be living at the time of my death."

On the testator's death his widow Paritoshini Dasi applied for and obtained probate of the will. The estate of Herambi accordingly vested in her as his legal representative and remained in her possession until her death three years later. It is alleged that in August 1909 she, in pursuance of the authority given to her by her deceased husband, adopted an infant of the name of Hem Chunder Dey. This child died on the 11th of March 1910 which was followed by the death of Paritoshini herself shortly after.

The present suit was instituted on the 30th of March 1910 by Kissory Moni Dasi, the adoptive mother of Herambi, against the two sons of Benodhri Dasi, his sister, for a declaration that in the events

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that had happened the devise to them had failed, and that the testator's estate had devolved on her. Kissory Moni died in September following, whereupon one Trailokya Nath Ghose, who alleged himself to be the next reversioner of the infant Hem Chunder was substituted in her place. Trailokya has died since the trial; and the present appellants are his son and widow who represent him as his executor and executrix respectively. The fact of the adoption by Pari-toshini of the infant Hem Chunder was denied by the respondents, but the question has not been tried. Both the Courts in India have dealt with the case on the assumption that the adoption was duly made as alleged by the plaintiff; and, on the construction of the will, have held that as the adopted son died without leaving male issue, on the death of the widow, the bequest to the sons of Benodini took effect and they accordingly dismissed the suit.

The judgment of the High Court is challenged on two grounds: *first*, it is urged that on the adoption of the infant, the estate vested in him as full owner by virtue of the Hindu Law of inheritance, that he took it in his capacity of son and not as devisee under the will, and on his death the property devolved on his heirs. Consequently, it is contended, the executory devise in favour of the respondents failed completely. *Secondly*, it is contended that it fails also under the provisions of section 111 of the Indian Succession Act (X of 1865) which has been made applicable to Hindus by the Hindu Wills Act of 1870.

It is to be observed that the will in this case does not infringe the rules which lay down the limitations on the testamentary powers of a Hindu. The bequest is to persons who were in existence at the time of the testator's death, and he does not create any estate unknown to Hindu law. Before proceeding to examine

the will in order to discover the intentions of the testator, their Lordships desire to make one further observation, viz., that under the Dayabhaga, the testator has not only the power of authorizing his widow to adopt a son to him, and in case of the death of such adopted son, to make other adoptions in order to ensure the performance of those religious rites on which depend his salvation in after life, but he can attach to such authority a direction that her estate should not be interfered with or devested during her life, just as he can postpone the succession of his natural-born son by interposing a life estate.

In the present case had the testator given to the widow a power to adopt without constituting her his executrix, she would have taken merely a widow's interest which would have become devested on her adopting a son. It is clear, however, from the language of the will that the testator was anxious that there being no natural-born son, a son should be adopted who and whose male issue should duly perform those religious rites which are considered essential in the Hindu system for the salvation of the deceased. With this object he empowered her to make five successive adoptions and constituted her as his executrix to give effect to his wishes. If the first son so adopted died in her lifetime without leaving male issue, she had the power to adopt a second; or a third, fourth, or fifth, in case the second, third, or fourth also died without leaving male issue. Thus the power to adopt confined to the widow could not be exhausted so long as she was alive until the directions of the testator had been fully carried out. It is obvious that the estate could pass only to the son who survived her, or, in case of his death in her lifetime, to his male issue, if he left any. Otherwise the whole object with which the power was given to the widow for making the adoptions

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would be defeated. The estate was in the widow during her life; the gift over is expressly declared to take effect after her decease in case of the failure of the adoptions without securing the object the testator had in view. Their Lordships conceive that a mere statement of the purpose of the testator which is apparent on the face of the will and of the consequences resulting from the contention advanced on behalf of the appellants, is sufficient to show its fallacy.

The infant who was adopted by the widow died in her lifetime unmarried and without leaving any issue, and as she died a few days later she was unable to give further effect to the wishes of her deceased husband. On her death, therefore, the gift to the sons of Benodini, the testator's sister named in the will, took effect, and the estate passed to them. But it has been strenuously contended that under the provisions of section 111 of the Indian Succession Act the bequest to them is void. That section runs as follows:—

"Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable."

Section 111 embodies the rule enunciated in *Edwards v. Edwards* (1). The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act, however, has given its statutory force. Even in India as regards Hindus, its application is confined to special tracts such as the territories subject to the Lieutenant-Governor of Bengal and the Presidency towns of Bombay and Madras. Their Lordships think that it should be applied only to cases strictly coming within its scope. In the present case the event on the occurrence of which the distribution was to take place is distinctly

mentioned as being the death of the widow. That being so, the gift to the nephews is not affected by section 111 and must take effect.

Their Lordships are of opinion that the judgments of the courts in India are correct and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitor for the appellants : *G. C. Farr.*

Solicitors for the respondents : *Watkins & unter.*

J. V. W.

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CIVIL RULE.

Before Mookerjee and Roe JJ

INDIA GENERAL S. N. & R. CO., LTD.

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v.

June 9.

LAL MOHAN SAHA.*

Plaint—Form of plaint—Suit against Corporations—Defendant misdescription of—Service on Corporations—Civil Procedure Code (Act V of 1908) O. XXII, rr. 1 and 2—Practice

In a plaint filed against two companies the defendant companies were described as "the India General Steam Navigation and Railway Company, Limited, and the Rivers Steam Navigation Company Limited by their joint agent A. E. Rogers" and notice was served on Mr. Rogers. Subsequently Mr. Rogers retired from the service of companies and left the country. At the trial of this suit, the plaint was amended and Mr. Rogers' name was omitted from the title of the suit which was proceeded with against the two companies.

Held that the plaint as originally framed was in contravention of O. XXII, r. 1 of the Code of Civil Procedure.

* Civil Rule No. 682 of 1914 against the order of Kamala Nath Dey, Small Cause Judge, Dacca, dated March 25, 1914.

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Ram Das Sein v. Stephenson (1), *Nubern Chunder Paul v. Stephenson* (2) and *Campbell v. Jackson* (3) referred to.

Held, a*bo*, that the amendment might stand, but the plaintiffs were bound to serve notices of the suit in the manner provided in Q. XXIX, r. 2, after the amendment had been made and the suit properly constituted.

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RULE obtained by the India General Steam Navigation and Railway Company, Ltd., and the Rivers Steam Navigation Company, Ltd., the defendants.

Five hundred bags of sugar were consigned by Messrs. Ralli Bros. to be carried by the India General Steam Navigation and Railway Company, Ltd., and the Rivers Steam Navigation Company, Ltd., from Calcutta to Naraingunge and the consignors transmitted the bills-of-lading to one Lal Mohan Saha and others. The bags arrived partly torn and damaged and their weight was less than the bills of lading showed. The consignees, thereupon, brought a suit in the Court of Small Causes at Dacca for recovery of damages against the carrying Companies and made Messrs. Ralli Bros. *pro forma* defendants. In their plaint they described the principal defendants as "the India General Steam Navigation and Railway Company, Ltd., and the Rivers Steam Navigation Company, Ltd., by their joint agent A. E. Rogers". Mr. Rogers filed his written statement and pleaded that the suit was not maintainable against him. Mr. Rogers then retired from the service of the Companies and left the country. At the trial of the suit, the plaint was amended by expunging the name of A. E. Rogers from it and the case was proceeded with against the companies. A decree having been obtained on the 25th March 1914 *ex parte*, the defendants applied for and obtained a Rule in the High Court to show cause why the judgment and decree of the Court of Small Causes should not be set aside.

Babu Manmatha Nath Mookerjee, for the petitioners. This suit was badly framed and was in contravention of the provisions of O. XXIX, r. 1 of the Code of Civil Procedure. The Companies ought to have been made the real defendants in the suit instead of the joint agent: see *Nubeen Chunder Paul v. Stephenson* (1) and *Campbell v. Jackson* (2). Assuming that the order for amendment of the plaint was properly granted and without admitting this fact, the two companies should have been served with notice in accordance with the provisions of O. XXIX, r. 2 of the Code of Civil Procedure. Furthermore, as one of the plaintiffs was dead and no substitution was made in the record, this suit in respect of that plaintiff has abated.

Babu Prokas Chandra Majumdar, for the opposite party. Both the cases relied on by the petitioners differed in essential points from the present case and must be distinguished. In the one the Agent of the East Indian Railway Company, and in the other the manager of a Tea Company, was made the defendant. Only in portions of the plaints in those two cases reliefs seemed to have been sought against the Companies. Moreover, in *Campbell v. Jackson* (2) the defendant Company apparently was not registered as a corporation under the Indian Companies Act. In the title of the present suit the companies were named first and then followed the words "by their joint agent, A. E. Rogers," and throughout the plaint in clear and unambiguous language every reference was to the companies and every relief claimed was against them. The insertion of the name of A. E. Rogers was to indicate the name of the person on whom the summons was to be served and it would appear from the written statement that he contested the suit on the

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merits. Evidence was gone into on the merits and no party seemed to have been misled by any vagueness in the description. As regards the second point, the plaintiffs were firms and under O. XXX, r. 4 of the Code of Civil Procedure no substitution was necessary.

Babu Manmatha Nath Mookerjee was not called upon to reply.

MOOKERJEE AND ROE JJ. This Rule was issued on the application of two of the defendants in the suit tried by the Court below. The plaintiff's opposite party instituted the suit against the India General Steam Navigation and Railway Company and the Rivers Steam Navigation Company for the recovery of damages on account of short delivery of goods committed to their care for transmission by them as public carriers. The third defendant, who was the consignor of the goods, was joined as a matter of form and no claim was made against him. The plaintiffs described the principal defendants as the India General Navigation and Railway Company and the Rivers Steam Navigation Company by their joint agent, Mr. A. E. Rogers. Mr. Rogers entered appearance and pleaded that the suit was not maintainable against him. When the case came on for trial, it was represented to the Court on behalf of Mr. Rogers that he had retired from the service of the companies mentioned and had in fact left the country. The plaintiffs thereupon applied to the Court for leave to omit the name of Mr. Rogers from the plaint. This application was granted and the suit was decreed *ex parte* as if it had been instituted properly against the two Companies. We are now invited to set aside this decree on the ground that the suit as brought was framed in contravention of rule 1 of Order XXIX of the Code of Civil Procedure; and that if the application for amendment

of the plaint was properly granted, the two Companies should have been served in accordance with rule 2 of Order XXIX. In support of this view, reliance has been placed upon the cases of *Ram Das Sein v. Stephenson* (1), *Nubeen Chunder Paul v. Stephenson* (2) and *Campbell v. Jackson* (3).

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There is no room for controversy that the plaint as originally framed was in contravention of rule 1 of Order XXIX. But on behalf of the opposite party, an ingenious argument has been put forward that the suit was in essence brought against the two companies and that the plaintiffs mentioned the name of Mr. Rogers as the person upon whom the process was to be served. There is obviously no foundation for this theory. The suit was substantially against Mr. Rogers, although he was sued in his capacity as joint agent of the two companies mentioned. The suit, however, should have been framed as one against the two Companies described by their proper names, as is clear from the decisions mentioned. There is plainly no excuse for the mistaken course deliberately adopted by the plaintiffs. Even a casual examination of the forms of pleadings appended to the Code of Civil Procedure makes it manifest that the suit was not properly framed; this form is identical with what was contained in section 26 of the Code of Civil Procedure of 1859. In the circumstances of this case, as no question of limitation arises even if the suit be taken to have been instituted against the two Companies on the date when the plaint was allowed to be amended, we are of opinion that the amendment may stand. But the plaintiffs were bound to serve notices of the suit in the manner provided in rule 2 of Order XXIX after the amendment had been made and the suit properly constituted. There is,

(1) (186^a) 10 W. R. 366 (2) (1871) 15 W. R. 534.

(3) (1885) I L. R. 12 Cal. 41.

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moreover, nothing to show that Mr. Rogers was in respect of each of the two Companies, a person entitled to receive notice under the provisions of that rule. It is needless, however, to deal with this aspect of the case in detail, because Mr. Rogers, it is conceded, is no longer connected with either Company.

The result is that this Rule is made absolute and the decree of the Small Cause Court Judge set aside. The case will be remitted to the Court below in order that the plaintiffs may proceed in accordance with law to serve the defendants, and then to have this suit tried afresh. We may add that a question has been raised before us as to the effect of the death of one of the plaintiffs during the pendency of the suit in the Court below; this will be determined by the Small Cause Court Judge when he takes up the case for final disposal. The petitioners are entitled to their costs in this Court.

O. M.

Rule absolute.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J., Woolroffe and Mookerjee JJ.

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Summons, service of—Substituted service—"Due and reasonable diligence"—Practice—Appeal from order refusing to set aside ex parte decree—Civil Procedure Code (Act V of 1908), O. V, rr. 12, 17; O. IX, r. 13—Costs.

For substituted service of summons to be effective, it is essential that the requirements of the rules of the Code should be strictly observed.

Knowledge of the institution of the suit, derived by the defendant *aliumne* is not sufficient in the absence of proper service of the summons.

Where the serving officer on three separate occasions went to the place of business of the defendant's firm, under the erroneous belief that it was his ordinary place of residence, and asked for the defendant and, on not finding him, posted a copy of the writ of summons on the outer door of the premises —

Held, that this was not sufficient service. Proper enquiries and real and substantial effort should be made to find out when and where the defendant is likely to be found.

Cohen v. Nursing Dass Auddy (1) followed.

APPEAL by the defendant Kassim Ebrahim Saleji from the order of IMAM J.

This was an appeal from an order refusing to set aside an *ex parte* decree.

On the 18th July 1914, a suit was instituted by Johurmull Khemka against the defendant for the specific performance of an agreement for the sale of the premises No. 98, Harrison Road, in Calcutta. The

* Appeal from Original Civil No. 17 of 1915 in suit No. 872 of 1914

(1) (1892) I L.R. 19 Calc. 201

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defendant did not enter appearance and the matter came on as an undefended cause. In the affidavit of service of summons sworn by Sitaram, a gomasta of the plaintiff, and Ishak the Sheriff's peon, it was deposed that Sitaram knew the defendant and the house and premises No. 1, Amratollah Street in Calcutta, "where the defendant ordinarily lives and resides," and that on the 1st, 3rd and 4th August 1914 the respondents went to the premises for the purpose of serving the writ of summons, and called aloud the defendant's name, but did not find the defendant or any agent empowered to accept service, or any adult male member of his family and thereupon, on the 4th August, a copy of the writ together with a Bengali translation thereof was affixed to the outer door of the premises. On the 9th December an *ex parte* decree was passed against the defendant.

On the 17th February 1915, the defendant filed a petition praying for an order that the *ex parte* decree should be set aside and the suit restored on the ground that the writ of summons had not been served on him. The defendant alleged that he came to know of the decree, only on receipt of a letter from the plaintiff's attorney, dated the 22nd January 1915. The defendant further deposed that he never resided at No. 1, Amratolla Lane, and that the premises were the place of business of the firm of Ebrahim Soleiman Saleji and Co., of which firm he was a partner.

The defendant's petition was supported by the affidavit of a *durwan* employed on the premises who denied that any one called out the defendant's name at the premises on the 1st, 3rd or 4th August 1914.

In his affidavit, in reply, the plaintiff alleged that on the 27th July 1914 his attorney wrote and sent a letter to the defendant's attorney intimating the institution of the suit and enquiring whether the latter would

accept service on behalf of the defendant, and that no reply was received thereto. In a further affidavit, Ishak deposed that on each of the three days that he went to the premises he enquired of the *durwan* at the gate (whose name he did not know) whether the defendant was inside the house and was informed that the defendant was not present; he thereupon entered the office room and made the same enquiry of a Mahomedan gentleman (whose name he did not know) and on receiving a similar reply, he called out the name of the defendant aloud. On the 3rd day Ishak affixed the writ of summons in the presence of the *durwan*.

On the 3rd March 1915, IMAM J. dismissed the application, observing as follows:—

"This application is for setting aside an *ex parte* decree passed in a suit that was undefended. The defendant in his sworn petition has stated that the service of summons on him had not been effected and in consequence of the deficiency of service he could not be present at the trial of the suit. The affidavits of Sitaram a servant of the plaintiff, and the bailiff are positive in their statements that the summons had been taken by the bailiff in the company of the plaintiff's servant to premises No. 1, Amratalia Street, where the defendant carries on his business and on the defendant not being found in spite of search made on three consecutive days service was effected by affixing the summons at the outer door of the house. It appears that soon after the institution of the suit the plaintiff's attorney Babu Debi Prosad Khatan communicated the fact of the institution of the suit to Mr J. C. Dutt the attorney on behalf of the defendant in the present matter enquiring of him if he would accept service of summons on behalf of the defendant who had been his client in the matter out of which the suit had arisen. To that letter Babu Debi Prosad Khatan received no reply, but it has been acknowledged by the assistant of Mr. J. C. Dutt that the letter was received and copy of it was forwarded to the defendant. In the petition no reference to the receipt of the letter has been made and no admission as to the knowledge of the defendant concerning the institution of the suit has been made. The petition merely refers to the fact of the passing of the decree and reading it carefully one comes to the conclusion that all reference to any knowledge concerning the institution of the suit has been advisedly avoided. On behalf of the petitioner only one ground for setting aside this *ex parte* decree has been urged and that is that the summons had

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not been duly served. The question resolves itself into one consideration only namely whether the summons had been served or not, and for this the affidavits of Sitaram and Ishak come to furnish a sufficient answer. I see no reason to disbelieve the statement these two persons have made in their affidavits; in fact there is every indication of their truthfulness. The application is dismissed with costs."

From this order the defendant appealed.

Mr. B. C. Mitter (with him *Mr. S. C. Roy*), for the appellant.

Mr. H. D. Bose (with him *Mr. K. P. Khaitan*), for the respondent.

Mr. Bose took the preliminary objection that the appeal did not lie. He contended that the High Court in its appellate jurisdiction can entertain an appeal from the Original Side only by virtue of section 15 of the Letters Patent, and not under powers conferred by the Civil Procedure Code. An order refusing to set aside an *ex parte* decree was not a judgment within section 15 of the Letters Patent. Order XII, r. 1 applies only to appeals to the High Court from Mofussil Courts: *Hurrish Chunder Chowdhry v. Kalisundari Debi* (1), *Toolsce Money Dissee v. Sudevi Dassee* (2), *The Justice of the Peace for Calcutta v. The Oriental Gas Co.* (3).

[Their Lordships not being prepared to admit the preliminary objection, it was not pressed further.]

Mr. B. C. Mitter. The learned Judge was in error and should have set aside the *ex parte* decree under Order IX, rule 13 of the Code on the ground that the summons was not duly served. The requirements of Order V, rule 17 were not satisfied for service to be affected by substituted service: *Cohen v. Nursing Dass Auddy* (4). Knowledge of the institution of the

(1) (1882) I L. R. 9 Calc. 482.

(3) (1872) 8 B. L. R. 433.

(2) (1899) I. L. R. 26 Calc. 361.

(4) (1892) I. L. R. 19 Calc. 201.

suit derived by the defendant *aliunde* did not dispense with the necessity of proper service.'

Mr. Bose. The usual practice was followed in attempting to serve the defendant personally, and on failing to find him substituted service was resorted to. The requirements of the Code have been substantially fulfilled. Under rule 17 of Order V of the new Code, substituted service can be effected equally well at the defendant's place of business as at his residence. The defendant was well aware of the institution of the suit before the decree was passed.

SANDERSON C.J. This appeal is from an order made by Mr. Justice Hassan Imam on the 3rd of March in this year, in which he refused to set aside a decree for specific performance of an agreement between the plaintiff and defendant. The decree was made on the 9th of December 1914, and it was made *ex parte*, the defendant not being present or taking any part in the proceedings. Then in consequence of a letter which was dated the 22nd January 1915, and written by the plaintiff's solicitor to the defendant, an application was made to Mr. Justice Imam to set aside the decree on the ground that the writ of summons had not been served upon the defendant. The learned Judge refused to set aside the decree and this is an appeal from his judgment.

Now, the service was supported in the first instance upon an affidavit in the usual form which is to be found at page 15 of the paper book, in which one Sitaram who was employed by the plaintiff and another, Ishak, who was in the employ of the Sheriff of Calcutta, swore that they had been to the defendant's house where he ordinarily lived and resided on the 1st, 3rd and 4th day of August, that they could not find him there; that they could not see any adult male

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member of his family, that they had called out his name in the usual way but got no response and that thereupon the writ had been posted upon the premises, and it was upon that affidavit of service that the learned Judge of the Court of first instance proceeded to give his decree.

Now, it turns out that the defendant did not reside at the premises, which are mentioned in the affidavits namely, No. 1, Amratolla Lane, in Calcutta. What took place was that these two men, whose names I have already mentioned, one in the employ of the plaintiff and the other in the employ of the Sheriff of Calcutta, went to the place where the defendant carried on business with his partner, and tried to find him there on the days in question, that the bailiff went into the business premises and saw somebody seated on a chair on each occasion, who told him that the defendant was not at that time at the place, and that then having cried aloud his name three times he posted the writ of summons upon the premises. The question is whether that is sufficient service. I may say at once that in one sense I regret that we have to allow this appeal because I have not much doubt in my mind, speaking for myself, that the institution of these proceedings did come to the knowledge of the defendant, and I do not think that the defendant has any merits in this application. But that is not the question. If I were to decide that what was done in this case was sufficient service of the writ, it might be taken as a precedent on other occasions. Inasmuch as I do not consider that what was done in this case was sufficient service, it would not be right for us to say that it was sufficient service, because we are strongly of opinion that the defendant knew of the issue of the writ. In my judgment, where it is a question of substituted service, and the defendant has not been served person-

ally, it is most essential that the requirements of the rules should be strictly observed in all respects.

Now, the rules which are material to this matter have already been referred to and I only intend to refer to them quite shortly. The first is Order V, r. 12 which says, "wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient." Now, in this case there is *no doubt* that service upon the defendant was not made personally, nor was it made upon an agent empowered to accept service. It is quite true that a letter was written by the plaintiff's attorney to a gentleman who was acting in respect of the dispute about these premises on behalf of the defendant, but that does not empower him to accept service, and unless he has authority from his client to accept service and does accept service, the mere fact that plaintiff's attorney writes to the defendants' attorney saying, "Will you accept service," and he receives no reply, in my opinion, is not sufficient. Therefore, it does not come within r. 12.

The next rule which is really material is Order V, r. 17. That has already been read by Mr. Bose, but I will read it again in part for the purpose of making my judgment intelligible. It says ". . . . Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court" Now, the question in

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member of his family, that they had called out his name in the usual way but got no response and that thereupon the writ had been posted upon the premises, and it was upon that affidavit of service that the learned Judge of the Court of first instance proceeded to give his decree.

Now, it turns out that the defendant did not reside at the premises, which are mentioned in the affidavits namely, No. 1, Amritolla Lane, in Calcutta. What took place was that these two men, whose names I have already mentioned, one in the employ of the plaintiff and the other in the employ of the Sheriff of Calcutta, went to the place where the defendant carried on business with his partner, and tried to find him there on the days in question, that the bailiff went into the business premises and saw somebody seated on a chair on each occasion, who told him that the defendant was not at that time at the place, and that then having cried aloud his name three times he posted the writ of summons upon the premises. The question is whether that is sufficient service. I may say at once that in one sense I regret that we have to allow this appeal because I have not much doubt in my mind, speaking for myself, that the institution of these proceedings did come to the knowledge of the defendant, and I do not think that the defendant has any merits in this application. But that is not the question. If I were to decide that what was done in this case was sufficient service of the writ, it might be taken as a precedent on other occasions. Inasmuch as I do not consider that what was done in this case was sufficient service, it would not be right for us to say that it was sufficient service, because we are strongly of opinion that the defendant knew of the issue of the writ. In my judgment, where it is a question of substituted service, and the defendant has not been served person-

ally, it is most essential that the requirements of the rules should be strictly observed in all respects.

Now, the rules which are material to this matter have already been referred to and I only intend to refer to them quite shortly. The first is Order V, r. 12 which says, "wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient." Now, in this case there is no doubt that service upon the defendant was not made personally, nor was it made upon an agent empowered to accept service. It is quite true that a letter was written by the plaintiff's attorney to a gentleman who was acting in respect of the dispute about these premises on behalf of the defendant, but that does not empower him to accept service, and unless he has authority from his client to accept service and does accept service, the mere fact that plaintiff's attorney writes to the defendants' attorney saying, "Will you accept service," and he receives no reply, in my opinion, is not sufficient. Therefore, it does not come within r. 12.

The next rule which is really material is Order V, r. 17. That has already been read by Mr. Bose, but I will read it again in part for the purpose of making my judgment intelligible. It says ". . . . Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court" Now, the question in

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this case is whether the facts as set out in two or three affidavits which have been referred to by Mr. Bose, show that the serving officer used all due and reasonable diligence. In my opinion it would be dangerous for this Court to hold that the facts set out there show that all due and reasonable diligence was used. One must remember that the first affidavit represented that the serving officer had gone to the defendant's dwelling house and tried to find him on three separate occasions, that he could not find him or any adult male member of the family and that he then proceeded to call out, outside the house, the name of the defendant and then posted a copy of the writ upon the premises of the defendant. This is one thing. But it turns out that a very different matter occurred. The serving officer went to the defendant's place of business, where he carries on business with his partner. There is no mention in the affidavit that the defendant resides there. In fact the defendant swears that he does not ordinarily reside there and, I am not prepared to hold that merely going to a man's place of business on three separate days,—a place of business, where he carries on business with other partners and where he may or may not be on these particular days or at the particular time of the day—and merely asking for him and then when he does not find him, posting a copy of the writ on the outer door of the premises is sufficient service. I may adopt the very excellent common sense rule laid down by one of my predecessors, Chief Justice Sir Comer Petheram. It is this : he says. "It is true that you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make enquiries and if necessary follow him. You should make enquiries, to find out when he is likely to be at home and go to the house at a time when he can be found. Before service like this can be

effected it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found—not as seems to be done in this country to go to his house in a perfunctory way." I lay stress upon the words perfunctory way : *Cohen v. Nursing Dass Auddy* (1). Now those are the words used by Chief Justice Sir Comer Petheram when he was dealing with a case where service was attempted to be made on a man at his dwelling house. I think that remark will apply *a fortiori* to this case where service was effected in a perfunctory manner by going to a man's place of business where he carries on business with a partner and where he may be or may not be on those days. As has been said, it is a very good rule to follow that proper enquiries and real and substantial effort not in a perfunctory way should be made to find out when and where the defendant is likely to be found.

Under these circumstances I think that although, as I have said before, I have no sympathy with the defendant, but having regard to the fact that if we allowed this service to pass we might be approving something which would be taken as a precedent which in my opinion should not be taken as a precedent, I think that the appeal should be allowed and we will hear Mr. Mitter on the question of costs.

(After discussion.) We think that the proper order in this case is that the appeal will be allowed upon the undertaking by Mr Mitter that no further service of the writ will be necessary. The suit will of course be restored.

The costs of the application before Mr. Justice Imam to set aside the decree will be costs in the cause and each party will bear the costs of this appeal;

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any costs if already paid by the appellant will be refunded.

WOODROFFE J. I agree that the appeal should be decreed. As there is no question in this case that the respondent did not go to the house of residence, it cannot be said that all due and reasonable diligence was used to find the defendant. The fact that the plaintiff went to the house where summons was posted under the impression that it was the defendant's place of residence which it was not, indicates an intent and knowledge that the defendant was likely to be found at his place of residence though in fact no search was made there. That the defendant had otherwise knowledge of the institution of the suit is highly probable. But that is not sufficient, if service is not formally proved.

I would like to add that the decision referred to by the Chief Justice, *Cohen v. Nursing Dass Auddy* (1) was followed by Sir Lawrence Jenkins C.J., and myself in an unreported decision in appeal from Order No. 75 of 1912, dated the 28th November 1913.

MOOKERJEE J. I am of opinion that the order of Mr. Justice Imam cannot be supported. The question for determination is, whether the appellant as an applicant who seeks to set aside a decree made *ex parte* against him has satisfied the Court within the meaning of r. 13 of Order IX, of the Code that the summons in the suit was not duly served upon him. The answer depends upon the true construction of rr. 12 and, 17 of Order V. Rule 12 recognises the fundamental proposition that whenever practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case

service upon such agent shall be sufficient. The present case does not fall within the exception, as it is not suggested that the defendant had an agent empowered to accept service. The notice given to Mr. Dutt, who had, acted as his attorney on a previous occasion, was also clearly insufficient, and reliance has not been placed thereon in support of the order under appeal. The question consequently arises whether service was made in fulfilment of the requirements of r. 17. That rule—I quote only so much of it as is relevant for our present purpose—provides that where the serving officer, after using all due and reasonable diligence, cannot find the defendant, he shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides, or carries on business, or personally works for gain. Here the plaintiff caused the notice to be affixed on the house at No 1 Amratolla Lane. The plaintiff erroneously assumed that the defendant ordinarily resided there; as a matter of fact it was not his residence; but in that house business was carried on by a firm whereof the defendant was a partner. In these circumstances, can we say that the plaintiff used all due and reasonable diligence to find the defendant; if he did not, the service in the mode in which it was effected was not in fulfilment of the requirements of the Code. In my opinion, the answer must be in the negative. I am not prepared to affirm the proposition that if the plaintiff makes no effort whatever to find the defendant in the place where he ordinarily resides and not finding him where he carries on business along with others, affixes the summons upon a conspicuous part of the business premises, the requirements of the Code are satisfied: *Cohen v. Nursing Dass Auddy* (1). Indeed,

(1) (1892) 1 L.R. 19 Calc. 201.

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the plaintiff has not proceeded on the theory that it was permissible under the law to serve summons in this manner. He acted on the footing that the defendant actually resided in the premises to which the summons was taken. He now discovers that he was under a misapprehension, and is consequently driven to maintain a position which is absolutely untenable. There is thus no escape from the conclusion that the summons was not duly served. It has finally been argued that there are ample indications that the defendant was aware of the institution of the suit against him. But this is plainly of no real assistance to the respondent, for if the summons was not duly served, as I hold it was not, the defendant is entitled under Order IX, r. 13 to have the *ex parte* decree set aside as against him. Consequently this appeal must be allowed and the application to set aside the *ex parte* decree granted.

Appeal allowed.

Attorney for the appellant: *J. C. Dutt.*

Attorney for the respondent: *D. P. Khaitan*

J. C.

APPELLATE CIVIL.*Before Fletcher and Richardson JJ.***PARMESHWAR DUBE**

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July 30.**GOBIND DUBE.***

Hindu Law—Partition—Mitakshara—Joint Family—Karta—Form of account to be directed against the Karta on a partition.

In an ordinary suit for partition of joint family property, in the absence of fraud or other improper conduct, the only account the *Karta* is liable for is as to the existing state of the property divisible, and the enquiry directed by the Court must be in the manner usually adopted to discover what in fact the property now consists of.

Chuckun Lall Singh v. Poran Chunder Singh(1) *Kumar Ray v. Gururay*(2), *Raja Setrucherla Ramabhadra v. Raja Setrucherla Narabhadra Sugunaratyan*(3), *Narayan bin Babaji v. Nathaji Durgaji Marwadi*(4), *Balakrishna Iyer v. Muthusami Iyer*(5) and *Shuklmooy Chandra Das v. Monohari Dass*(6) referred to.

Obhoy Chunder Roy Choudhry v. Pearce Mohun Gouho(7) and *Damodardas Manecklal v. Uttamram Manecklal*(8) explained.

APPEAL by the defendants, Parmeshwar Dube and others.

This appeal arose out of a suit brought by some members of a joint Mitakshara Hindu family against the other members thereof for partition of the joint family property and for an order that the defendant

* Appeal from Original Decree, No. 48 of 1913, against the decree of Amrita Lal Palit, Subordinate Judge of Moradpur, dated Jan. 31, 1913.

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| (1) (1866) 9 W. R. 483. | (5) (1908) 1. L. R. 32 Mad. 271 |
| (2) (1881) 1. L. R. 5 Bom. 589. | (6) (1885) 1. L. R. 11 Calc. 684, |
| (3) (1899) 1. L. R. 22 Mad. 470, | L. R. 12 L. A. 103, 111 |
| L. R. 26 L. A. 167 | (7) (1870) 13 W. R. (C. B.) 75, |
| (4) (1903) 1. L. R. 28 Bom. 201. | 5 B. L. R. 347. |
| (8) (1892) 1. L. R. 17 Pow. 271. | |

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No. 1, who was the *karta* of the joint family, do submit an account in respect of the income received in cash and in kind from the joint family properties, as well as in respect of the outstanding, hard cash, etc., from 8th Sawan 1283, that is the date when the defendant No. 1 became *karta*, to the date of the preliminary decree in the suit. The main defence to the action was that a partition had taken place between the parties in 1305 and that the plaintiffs and the defendants were not in joint possession of any property as members of a joint Hindu family. The Subordinate Judge came to the conclusion that no partition had in fact taken place between the parties and that they were still joint. He accordingly passed a decree for partition and for the rendering of an account by the defendant No. 1 to the plaintiffs. He held the defendant No. 1 was liable to render accounts from 8th Sawan 1283, corresponding to 14th July 1876, in respect of all sums received by him and also in respect of all sorts of business relating to the joint family, and directed that a Commissioner be appointed for taking the accounts and making the partition.

Sir Rashbehary Ghose (with him *Babu Gour Chandra Pal*), for the appellants. The defendant No. 1 is not bound to account for all years from 1876. The plaintiff Gobind Dube came of age in 1889 or 1890, and since then he had access to the accounts: *Chukun Lall Singh v. Poran Chunder Singh* (1). In a joint Hindu family the *karta* is not in the position of a trustee. You can take into account only the existing assets: Mayne's Hindu Law, section 294, Trevelyan's Hindu Law, page 261; *Konerrav v. Gurrao* (2) *Raja Setrucherla Ramabhadra v. Raja Setrucherla Virabhadra Suryanarayana* (3), *Naryan bin Babaji*

(1) (1868) 9 W. R. 483

(3) (1899) I. L. R. 22 Mad. 470;

(2) (1881) I. L. R. 5 Bom. 589.

I. L. R. 26 I. A. 167.

v. *Nathaji Durgaji Marwadi* (1), *Bhowani Proshad Shahu v. Juggernath Shahu* (2). In this case the plaintiffs attempted to prove that certain specific properties were part of the joint family property and failed and they cannot now be allowed to claim a general account: *Balakrishna Iyer v. Muthusami Iyer* (3).

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Dr. Dwarka Nath Miller (with him *Babu Baikunta Nath Miller*, *Babu Shivanandan Roy* and *Babu Baidyanath Naryan Singh*), for the respondents. I contend that the position of a joint family manager is that of a trustee. I ask for an enquiry into the income and expenditure from 1876. You can not find out what the property is at present, unless you know what the assets were in 1876. On the authorities the defendant is certainly bound to account for the existing assets. Besides the cases cited by Sir Rashbehary Ghose, I refer your Lordships to the cases of *Obhoy Chunder Roy Chowdhry v. Pearcee Mohun Gooho* (4) and *Damodardas Maneklal v. Uttamram Maneklal* (5).

Cur. adv. vult.

FLETCHER J. This is an appeal by the defendants against the judgment of the learned Subordinate Judge of Mozaffarpur, dated the 31st of January 1913.

The plaintiffs brought the present suit for partition. The defence was that a partition took place between the parties in the year 1305.

The learned Judge found that there was no such partition. The defendants called a considerable body of evidence to prove the story set up by them. The learned Judge, however, remarked "The story of division and separation in 1305 is therefore a myth I entirely disbelieve the witnesses examined by the

(1) (1903) 1 L. R. 28 Bom. 201.

(4) (1870) 13 W. R. (F. B.) 75.

(2) (1903) 13 C. W. N. 309.

5 B. L. R. 347.

(3) (1908) 1 L. R. 32 Mad. 271

(5) (1892) 1 L. R. 17 Bom. 271

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defendants and find that there was no partition in 1305." The defendants have asked us to dissent from this finding of fact by the learned Judge. In the first place, it seems highly improbable that the partition, if there had been one, could have taken place as long ago as the year 1305. No reason is given why a partition should have taken place at that date. There is no document from which it could be inferred that a partition took place as long ago as the year 1305. The story set up by the plaintiffs that the plaintiff No. 1 separated in mess from the defendants in 1309 has been accepted by the Judge, and so far as I could gather from the learned vakil of the defendants appellants, he only faintly challenged the fact that the separation in mess took place in 1309. But he asked us to use the separation in mess in 1309 as proof, or at any rate very strong evidence, of a partition. The case of the defendants is not, however, that there was a partition in 1309 and they must stand or fall by the case they put forward in their oral evidence. The defendants have kept back the books of account. The books would be of the greatest value, if they had been produced. Take for instance the question as to the expenses of marrying the daughters of the plaintiff No. 1. The case of the defendants was that the plaintiff No. 1 had raised a loan to marry his third daughter. The answer of the plaintiff No. 1 was that it was true that he borrowed money to marry his third daughter; but that his other two daughters were married at the expense of the family in 1305 and 1309. This, if true, shows that there could not have been a partition in 1305. The defendants by the production of the books of account could easily have shown whether or not the statement of the plaintiff No. 1 was correct.

Then the defendants produced certain *sheahas* in order to prove that the plaintiffs were in receipt of

their share of the rents and profits from 1305. There can be little doubt that the learned Judge arrived at a correct conclusion when he found that these papers were fabricated.

Then again it is admitted that after the date of the alleged partition the plaintiff No. 1 and the defendants have brought suits jointly to recover rent in arrear. Further, it is not shown that any portion of moneys that have been realised under any of these decrees was made over to the plaintiffs. The learned Judge also points out that the family clearly had a money-lending business and it is not alleged that the amounts due by debtors were partitioned.

The forms of the road-cess returns do not support the partition alleged by the defendants. The matters relied on by the defendants are first the separation in mess. No doubt this is a matter for consideration; but it is not conclusive. Further, the separation appears to have taken place in 1309. Then the lease to Dholi Factory and the mortgage to Mackenzie have been relied on. And also the application for registration by the plaintiff No. 1 for registration of his share in mouza Sardimal. The lease and mortgage do no doubt suggest that the plaintiff No. 1 had a separate share; but in neither of these documents is it stated that there had been a partition between the parties.

With reference to the separate registration of the name of the plaintiff No. 1 under the provisions of the Land Registration Act, Sir Rashbehary Ghose, who appeared for the appellants, very frankly informed us that we ought not to place too much stress on this matter, as he said it was a matter within his own experience that in many cases of families governed by the Mitakshara law, applications were made for registration of distinct shares when admittedly there had been no partition. The appellants also rely on the

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opening of a separate account for payment of Government revenue by the plaintiff No. 1 with reference to certain of the mouzas. But this was only done after the defendants Nos. 1 and 2 had applied to have separate accounts opened in their names. Upon the

whole I cannot find that on the documentary evidence the learned Judge ought to have believed the witnesses for the defendants who spoke to the actual partition in 1305. The onus of proving the partition was clearly on the defendants, and I am not prepared to dissent from the finding of the learned Judge that they have failed to prove the partition alleged. The point, however, that was chiefly in debate before us was as to the form of account to be ordered against the *karta*. The learned Judge has ordered the defendant No. 1 to render accounts from the year 1283 corresponding with the year 1876 that is the date when the defendant No. 1 became *karta*. The plaintiff No. 1 attained majority in the year 1889 or 1890. The question is, therefore, what is the usual form of account to direct against the *karta* of a Hindu joint family on a partition. The cases are not very numerous on this matter and are not easy to reconcile. The family we are dealing with is governed by the Mitakshara Law. The earliest authority is a decision of Phear J. in *Chuckun Lall Singh v. Poran Chunder Singh*(1). This decision was explained by a Full Bench of this Court in *Obhoy Chunder Roy Chowdhry v. Pearce Mohun Gooho*(2). But as I read the decision of the Full Bench the decision of Phear J. was not overruled. In the case of *Konerrav v. Gurrav*(3), Melvill J. observed: "The ordinary rule, no doubt, is that the members of an undivided Hindu family, when making a partition, are entitled, not to an account of past

(1) (1868) 9 W. R. 483

(2) (1870) 13 W. R. F. B. 75.

(3) (1881) I. L. R. 5 Bom. 589

transactions, but to a division of the family property actually existing at the date of partition." In the case of *Damodardas Maneklal v. Ultamram Maneklal* (1), Sargent C. J. commented on this decision. His view was that the form of the account depended on the circumstances of each particular case. The learned Chief Justice seems, moreover, to have considered that Melvill J. had laid down that the members of the family were bound to accept the *karta*'s statement as to what the property consisted of. But Melvill J. was dealing with the form of the account not with the evidence the *karta* should give to vouch or justify the account. In the case of *Raja Setrucherla Ramabhadra v. Raja Setrucherla Virabhadra Suryanarayana* (2), the Judicial Committee of the Privy Council appear to have assumed that in a partition the *karta* usually would only be liable to account as to the existing state of the property. In the case of *Narayan bin Babaji v. Nathaji Durgaji Marwadi* (3), Chandavarkar J. remarked: "If we allowed it, we should be acting contrary to the principle of law that in a partition suit no coparcener has any right to an account of past transactions." A similar view was adopted in the Madras High Court in the case of *Balakrishna Iyer v. Muthusamu Iyer* (4). The result of these authorities I think is that in an ordinary suit for partition in the absence of fraud or other improper conduct, the only account the *karta* is liable for is as to the existing state of the property divisible. The parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters.

But of course this does not mean that the parties

(1) (1892) I. L. R. 17 Bom. 271, 279 (3) (1903) I. L. R. 29 Bom. 291.

(2) (1893) I. L. R. 22 Mad. 470; (4) (1908) I. L. R. 32 Mad. 271.

I. R. 26 I. A. 107.

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are bound to accept the statement of the *karta* as to what the properties consist of. That would not be an account at all. The *karta* is the accountable party and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in fact the property (not what the *karta* says it) now consists of.

The decree of the lower Court must be varied by ordering an account of the existing state of joint property in lieu of that ordered by the learned Judge.

The plaintiff No. 1 admits that he has received certain moneys forming a portion of the joint estate. The plaintiff No. 1 must account for these moneys.

Subject to these remarks the judgment of the learned Judge in the Court below must be affirmed and the appeal dismissed. There will be no order as to the costs of the appeal to this Court.

RICHARDSON J. I am of the same opinion. As to the form of accounts, the order which we propose to make is supported by the case of *Shookmoy Chandra Das v. Monoharri Dassi* (1).

A. K. R.

Decree varied.

(1) (1885) I. L. R. 11 Calc. 684; L. R. 12 I. A. 103, 111.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

ATIMANNESSA BIBI

v.

ABDUL SOBHAH.*

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July 21.

Wakf—Mutawalli—Matters connected with wakf being religious matters—Descendant of the founder—Preferential claim to mutawalliship—No right of inheritance—Qadi under the Mahomedan law exercising functions in relation to wakfs—Its equivalent in the British Indian system of law—Position of the Subordinate Judge—District Judge, jurisdiction of.

Though a descendant of the founder of a *wakf* property has a preferential claim to the office of the *mutawalli*, he does not become *mutawalli* by right of inheritance but has to be appointed such by the Qadi who may supersede him if he is not so qualified. No right of inheritance attaches to a religious endowment.

Khajeh Salimullah v. Abul Khair M. Mustafa (1), *Sayad Abdula v Sayad Zain* (2), *Mohummud Sadik v. Mohummud Ali* (3) and *Shahar Banoo v. Aga Mohamed* (4) followed.

Shama Charan v. Abdul Kabeer (5), *In re Wooratunnessa Bibi* (6), *In re Halima Khatun* (7), *Nimai Chand v. Golam Hossein* (8), *Muhammed v. Syed Ahamed* (9), *Jamal v. Jamal* (10), *Daud Sha v. Ismail Sha* (11), *Baba v. Nassaruddin* (12), *A. G. r. Abdul Kadir* (13), *Kudratulla*

* Appeal from Appellate decree No 3561 of 1911, against the decree of T. W. Richardson, District Judge of 24-Parganas, dated Sep. 18, 1911, reverting the decree of Pramatha Nath Chatterjee, Subordinate Judge of Alipur, dated March 9, 1911.

(1) (1909) I. L. R. 37 Calc. 263. (7) (1910) I. L. R. 37 Calc. 870.

(2) (1888) I. L. R. 13 Bom. 555. (8) (1909) I. L. R. 37 Calc. 179, 187.

(3) (1798) 1 Mac. Sel. Rep. 22. (9) (1861) 1 Bom. H. C. R. 18

(4) (1906) I. L. R. 34 I. A. 46; (10) (1877) I. L. R. 1 Bom. 633

I. L. R. 34 Calc. 118. (11) (1878) I. L. R. 3 Bom. 72.

(5) (1898) 3 C. W. N. 158. (12) (1893) I. L. R. 18 Bom. 103.

(6) (1908) I. L. R. 36 Calc. 21. (13) (1894) I. L. R. 18 Bom. 401.

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v. *Mahini Mohan* (1), *Mahammed v. Ahmed Bhai* (2), *Sayid Ali v. Ali Jan* (3), *Muhammad Abdul Majid v. Ahmed Saeed* (4) referred to.

Under the Mahomedan law that Qadi alone was competent to exercise authority in respect of *wakfs* who was so expressly authorised in his letters patent. There was some difference of opinion upon the question whether such express authority was needed where a person was explicitly appointed the Chief Qadi; but even here the balance of opinion of jurists favours the view that power should be expressly conferred on the Chief Qadi to validate the administration of *wakfs* by him. There is also authority to show that the supreme authority in the State, by whom the Qadi is appointed, need not be a Mahomedan and although there is some divergence of opinion, there is also authority to show that the office of Qadi may be held by a non-Muslim for the decision of disputes between non-Muslims under Muslim protection. As this is a matter regarding religious usages and institutions within the meaning of section 15 of Regulation IV of 1793, the rights of the parties must be determined with regard to the provisions of the Mahomedan law on the subject. It follows, accordingly, that a Subordinate Judge, who has not been expressly authorised by the Government to exercise functions in connection with the administration of *wakfs*,

not competent to act in that behalf. Whether a District Judge has implied authority to exercise the functions performed by a Qadi under the Mahomedan law is doubtful. In respect of *wakfs* which may be described as trusts created for public purposes of a religious nature within the meaning of sub-section (1) of section 92 of the Civil Procedure Code, 1908, the District Judge may be assumed to have been authorised to discharge the functions of a Qadi. The real difficulty arises in the case of private *wakfs*. It is desirable that the Local Government should, to cover such cases, authorise either District Judges or Subordinate Judges or even judicial officers of a lower grade, if necessary, to exercise the functions of a Qadi.

SECOND APPEAL by Atimannessa Bibi, the plaintiff.

This appeal arises out of a suit for declaration that the plaintiff was entitled to be *mutawalli* and for recovery of possession of the *wakf* property. The suit related to two plots of land, one of the area of about 12 cottas in area on a portion of which a mosque stood and another, a plot of tenanted

(1) (1869) 4 B. L. R. 134, 169.

(2) (1900) I. L. R. 25 Bom. 327.

(3) (1912) I. L. R. 35 All. 98.

(4) (1913) 11 All. L. J. 673.

land of the area of about a bigha and ten cottas. The plaintiff's case was that her great-grandfather, one Azimuddin deceased, was the founder of the said mosque and that the other plot of land was dedicated by him for the support thereof and that she, as the direct descendant of the *wakif* was entitled to be the *mutawalli* and that she had in fact been in charge of the *wakf* after the surrender in her favour of the management by the heirs of the last *mutawalli*, one Saburan Bibi deceased, who, according to her, were entrusted by her with the management of the endowment after the death of the said Saburan Bibi but she submitted that the defendants and others, having brought a collusive suit, in the Court of the District Judge for the appointment of the defendant No. 3 as the *mutawalli*, have dispossessed her of a portion of the said tenanted plot and are interfering with her duties as *mutawalli* of the *wakf* property. She sued for recovery of possession of the said portion and confirmation of possession in respect of the rest on the declaration of her title as *mutawalli* and for injunction and mesne profits. The defendants Nos 1 and 3 only contested the suit. The others did not appear. The defendants Nos. 1 and 3 pleaded limitation, insufficiency of stamp on the plaint, and misjoinder, questioned the form of the suit and submitted that section 92 of the Civil Procedure Code barred the suit, the endowment in suit being a public endowment. They further disputed the competency of the plaintiff to be a *mutawalli* and her right to mesne profits.

The Second Subordinate Judge decreed the suit. The defendant No. 3 then appealed to the District Judge who, reversing the decision of the Subordinate Judge, allowed the appeal and dismissed the suit with costs in both the Courts. Hence this second appeal.

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Babu Umakali Mookerjee, Babu Tarakishore Chowdhuri, Moulvi Mahomed Mustafa Khan and Babu Satish Chandra Mookerjee, for the appellant.

Mr. Arthur Caspersz and Moulvi Wahed Hossain, for the respondent.

Cur. adv. vult.

MOOKERJEE J. The subject-matter of the litigation which has culminated in the appeal consists of immoveable property dedicated as *wakf* in or about the year 1836 by a Mahomedan named Azimuddin Mistri. A mosque was erected by the founder on a portion of the land and income for its maintenance is derived from the remainder which is in the occupation of tenants. Azimuddin constituted himself the first *mutawalli* and acted as such so long as he was alive. He appointed his grandson Imaumuddin as the next *mutawalli*; the latter executed a *tawliatnama* on the 13th March 1854 whereby he appointed one Sekandar as his successor in the office of *mutawalli* with authority to appoint a successor. On the 1st December 1892, Sekandar, in the exercise of the power vested in him, appointed his daughter, Saburan Bibi as *mutawalli*; she performed the duties of the office for over seven years and died in the year 1900, without appointing anyone as *mutawalli*. Two brothers of Saburan, Yakub and Yasin by name, however, took possession of the *wakf* properties and administered them for a term of seven years. On the 22nd February 1907, Yakub and Yasin executed a deed of relinquishment in favour of the plaintiff, Atimannessa Bibi, daughter of Imaumuddin, the grandson of Azimuddin. In this deed they admitted that as the sole surviving descendant of the founder she had a preferential claim to the office of *mutawalli*. Immediately after this, there was a scramble for the possession of the *wakf* properties

and on the 22nd July 1907, a suit was instituted, with the consent of the Advocate-General, under section 539 of the Civil Procedure Code of 1882, in the Court of the District Judge, by persons who claimed to be interested in the due administration of this religious trust. The assistance of the Court was sought, as it could only have been sought, on the allegation that the trust had been created for public purposes. The three sons of Sekandar were originally joined as defendants. The present plaintiff subsequently applied to be made a defendant, but as she alleged that the *wakf* constituted a private trust not affected by section 539, her application was refused on the authority of the decision in *Budh Singh v. Niradbaran* (I). As the original defendant did not deny that the trust was a public one within the meaning of section 539, the suit as against them was tried in due course, and one Abdus Sobhan, who had married the daughter of Kariman a son of Sekandar, was appointed *mutawalli* on the 28th May 1908. The District Judge, however, expressed the opinion that he had a very strong suspicion that the suit was purely collusive and had been brought to defeat Atimannessa. On the 16th March 1910, she commenced the suit for declaration of her title as *mutawalli* of this trust, which she alleged, was a private *wakf*, and also for an injunction to restrain the defendants (in which category she included Abdus Sobhan) from interfering with her possession of the endowed properties. The Subordinate Judge, held, that the *wakf* constituted a public trust, contrary to the allegations of the plaintiff but that, as the sole surviving descendant of the founder, she had established a claim to the office of *mutawalli superior to that of any stranger*; in this view he decreed the suit. On appeal, the District Judge

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affirmed the view of the trial Court as to the public nature of the *wakf*, but dismissed the suit on the ground that so long as the decree in the suit under section 539 remained in force, no relief could be awarded to the plaintiff. The plaintiff has now appealed to this Court. On an analysis of the elaborate arguments addressed to the Court on both sides, the following two points emerged for consideration, namely, *first*, did the plaintiff as the sole surviving descendant of the founder become *mutawalli* by operation of law when the last *mutawalli* died without appointing a successor; and, *secondly*, can the plaintiff be appointed *mutawalli* in this suit, instituted in the Court of the Subordinate Judge, and relief granted to her on the basis of such appointment?

As regards the first ground, it is plain that the plaintiff did not, by operation of law, become the *mutawalli* by right of inheritance on the death of the last *mutawalli*. The Rule on the subject is thus stated by Neill Baillie in his Treatise on Mahomedan Law Vol. I., p. 593: "When the Superintendent has died and the appropriator is still alive, the appointment of another belongs to him and not to the Judge; and if the appropriator be dead his executor is preferred to the Judge. But if he has died without naming an executor the appointment of an administrator is with the Judge. In the *Asl* it is stated that the Judge cannot appoint a stranger to the office of administrator, so long as there are any of the house of the appropriator fit for the office, and if he should not find a fit person among them, and should nominate a stranger, but should subsequently find one who is qualified, he ought to transfer the appointment to him. When the appropriator has made it a condition that the Superintendent shall be of his children and children's children, and the Judge appoints another,

than one of these without any malversation, is the person so appointed the Superintendent? Boorha-noodeen has said "No." It is obvious from this statement of the law that though a descendant of the founder has a preferential claim to the office of *mutawalli*, he does not become *mutawalli* by right of inheritance, but has to be appointed such by the "Qadi" who may supersede him if he is not qualified. This view is confirmed by two texts from works of recognised authority on Mahomedan Law, translated in the judgment of this Court in the case of *Khajeh Salimullah v. Abul Khair M. Mustafa* (1). One of these texts is from the *Is'tāf* of al-Tarabulusi (Cairo Ed. p. 42) and the other is from the *Fatawa Al-Umri* (Cal. Ed., Vol. II, p. 507): see other texts translated by Ameer Ali in his Mahomedan Law, Vol I, 4th. Ed., pages 451, 759, 760, 763 and 765. See also Anglo-Mahomedan Law by Sir Roland Wilson, para. 328, and Tayabji on Mahomedan Law, p. 111. Indeed it may be taken as a settled doctrine of Mahomedan Law that no right of inheritance attaches to a religious endowment. As Parsons, J. observed, with the concurrence of Sargent, C.J., in *Siyal Abdula v. Sayad Zain* (2), it is by appointment that one officer succeeds to another appointment either by the original appropriator or by his successor or executor, or by the Superintendent for the time being, or failing all these, by the ruling power. This is laid down distinctly by Maenaghten in his Mahomedan Law, Chapter X. on Endowments, paras. 5 and 6; Precedents of Endowments, Cases IX and X. Consequently, the position cannot be sustained that the plaintiff became by operation of law the *mutawalli* of his *wakf* as the sole surviving descendant of the founder when the last *mutawalli* died without having appointed his successor.

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This conclusion is, in accord with the decision in *Moohummud Sudik v. Moohummud Ali* (1) and *Shahar Bano v. Aga Mahomed* (2). The first contention of the appellant must accordingly be overruled.

As regards the second ground, the question arises whether in the present suit instituted in the Court of the Subordinate Judge the plaintiff can be appointed *mulawalli* of the *wakf*. As is obvious from the texts already mentioned where, as here, the appropriator is dead and has not left an executor, the power of appointment rests with the Qadi. The problem thus requires solution, who is the Judicial Officer in the British Indian System of Law who corresponds to the Qadi under the Mahomedan Law and can exercise his functions in relation to *wakfs*. The question has never been fully investigated; but it was assumed in the cases of *Shama Charun v. Abdul Kabeer* (3), *In the matter of Wozatunnessa Bibee* (4), *In re Halima Khatun* (5), that the Civil Court of superior jurisdiction in the locality where the *wakf* properties are situated is vested, generally speaking, with the powers exercised by the Qadi under the Mahomedan régime. On the other hand in *Nimai Chand v. Golam Hossein* (6), it was observed that if a District Judge or a Judge of this Court in its original jurisdiction could exercise the functions of a Qadi, there was no apparent reason why a Subordinate Judge who has jurisdiction over the *wakf* property should not be deemed equally competent to discharge those functions. As the question is of paramount importance, I have investigated the position of a Qadi under the Mahomedan Law, a problem which, so far as I am

(1) (1798) 1 Mac. Sel. Rep. 22.

(3) (1898) 3 C. W. N. 158.

(2) (1906) L. R. 34 I. A. 46;

(4) (1908) I. L. R. 36 Calc. 21.

I. L. R. 34 Calc. 118.

(5) (1910) I. L. R. 37 Calc. 870.

(6) (1909) I. L. R. 37 Calc. 179; 187.

aware, has been treated historically only in the valuable lectures on the History of Muslim *Institutions* delivered by Dr. Abdullah al-Matruhi Suhrawardy as Tagore Professor of Law in the University of Calcutta. No assistance in the solution of this question has been derived from an examination of the legislative enactments and judicial decisions relating to the powers and duties of a "Qadji" appointed under the Anglo-Indian System of Law. Amongst these may be mentioned Bombay Regulation XXVI of 1827 repealed by Act XI of 1861, Act XII of 1880; Harington's Analysis of the Bengal Regulations, Vol. I, 2nd Ed., pages 67, 219, 223; Colebrook's Supplement to Digest of Regulation, pp. 1, 14, 19; Morley's Digest, Introduction 30, 31 34, and *tit. Kazi*; *Muhammad v. Syed Ahamed* (1), *Jamal v. Jamal* (2), *Daudsha v. Ismalsha* (3), *Baba v. Nassaruddin* (4), *A.-G. v. Abdul Kadir* (5). It is necessary therefore to examine the original texts on the subject. The following texts illustrate the position of the "Qadji" under the Mahomedan Law.

TEXT I.

لو كان الوصي أو المأولى من جهة العاكم فما وثق أن
يدين به من الصكوك والسجلات وهو الوصي من جهة حاكم له
ولاية نصب الوصي والدولية لانه لو اقتصر على قوله وهو الوصي من
جهة العاكم وما يكون من حاكم ليس له ولاية نصب الوصي
فإن القاضي لا يملك نصب الوصي والمأولى الا إذا كان ذكر
الاقتراف في الا ورثاب والا بثام مقصوصما عليه في مذشورة
نصار كعكم التائب القاضي ثانية لا بد فيه ان يذكروا ان فلانا
القاضي مادون بالانتاجة تحرز عن هذا الهرمالجزء الثاني من
بجامع الفصولون صفحه ١٥ مطبوع مصر *

(1) (1861) 1 Bom. H. C. App. 18

(3) (1878) I. L. R. 3 Bom. 72.

(2) (1877) I. L. R. 1 Bom. 633.

(4) (1893) I. L. R. 18 Bom. 101.

(5) (1894) I. L. R. 18 Bom. 401.

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TEXT II.

وهبها تبدا لاد منه وهو **حال المواد بالقاضي الاع** يملك
ذلك الوضي والمترابي ودوره له النظر على الا وقف قلت
وهو قاضي القضاة لاكل ما في جامع الفسودين من الفصل
السابع والعشرين لو كان الوضي او المترابي من ملائكة
بالا باده تبررا عن هذا الوهم اه ولاشك اه قول اسلطار حملتك
فأه ي القضاة كالذئب عي هذه اشياه في المنشور كما صرح
به في الخلاصة في مسئلة استخلاف القاضي و على هذا فقولهم
في الستمائة دامر القاضي المراد به قاضي القضاة و في كل
موضع ذكروا القاضي في امره الا وقف بخلاف قولهما و اذ رفع
آية حام ومن اعنة آياته أعم العجز الخامس من ابتداء
الأفق صفحه ٢٥٢ مطابع مصر *

Here there is a point to which attention should be called (*tanbîh*) and which is indispensable and it is—what is meant by the Qadi who possesses the power of appointing the executor and the *mutawalli* and has the supervision of *wakfs*? I say it is the Chief Qadi (Qadi of Qadis) and not every Qadi, because of what is stated in the 27th Chapter of the *Jami' al Fusûlayn* (Text I is quoted here). There is no doubt that the Sultan's saying "I appointed thee chief Qadi" is like expressly mentioning these things in the Letters Patent, as is expressly stated in the *Khulâsah* in connection with the question of the Qadi's power of appointing his substitute or successor. According to this, in their (jurists') statement regarding obtaining a loan with the sanction of the Qadi, by 'Qadi' the Chief Qadi is meant, and in every place where the Qadi is mentioned regarding *wakf* affairs. This is contrary to their (jurists') statement: "When the order, or judgment of a Qadi is brought before him, is referred to him, he executes it." for this is general, i.e., here the word Qadi is used in a general sense. (*Bahr al-Râ'iq*, Cairo Ed., Vol. V, p. 252.)

TEXT III.

(سئل) في وقف مسجل أبطة غالب قاض مستند
إلى عدم لزمه عند الإمام الاعظم فهل للذائب
ولاية ابطال للدعني المذكور أم ولاية الابطال خاصة
بالقاضي الاصلي (أمام) قال في البخاري
الرازي ودہنا نبیه قابع منه وهو ما العز من
القاضي الذي يملك تصرف الرصي والمتولي
ويكون له الظاهر على الا وقاف قلت هو ذا
القضية لا كل قاض ثم قال وعلى هذا فقولهم

سقا ب ليس
الامتولي اليمالي
الوقف و نصب
الادعاء و تولدة
باد - تدامة و
و اذما ذلك كاه
القاضي الظفارة *

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في الاستدامة بأمر القاضي المراد به قاضي القضاة و في كل موضع ذكرنا القاءى في أمور الا وقف اه فبصريح في أن غالب القاضى ليمانك ابطال الوقف و انما ذلك خاص بالاصل (الذى نذر له الساطان في منشرة نص نواولة و الا وعياد وفروعه و أمور الا وقف و ينبعى الا عتماد عليه) ان بيت فيه شيخنا الشیخ محمد بن سراج الدين الحانوتی اما في اطلاق مثله للنواب في هذا الزمان من الاختلاف والمسئلة لانه فيها اخوصها فيما اطلعنا عليه وكذلك فيما اطلعنا عليه شيخنا المذكور والشيخ زن مصاحب البصر انه استخرجها تفقها و الله أعلم..... لجزء الاول من القنوارى الخيرية صفحة ١٨٣ مطبوع مصر *

(He was questioned) regarding a registered *wakf* set aside by a Deputy Qadi who relied on the absence of its bindingness according to the great Imam, "Has the deputy the power of setting it aside for the reasons mentioned or is the power of setting it aside peculiar to the original Qadi"? (He answered):—It is stated in the *Bahr al-Rā'iq* (Text II is quoted here as far as "*wakf* affairs").

Thus it (*i.e.* *Bahr al-Rā'iq*) is explicit regarding that the Deputy Qadi has not the power of setting aside the *wakf* and that that is peculiar to the original (Qadi) in whose letter of appointment the Sūltan has mentioned the appointment of *mutawallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be placed upon this, although our master, Shaykh Muhammad b. Sirāj-al-din-al-Hānūti has examined, criticised, discussed it; because of the difference of opinion* with regard to the application

* The author of the *Radd al-Muktaṭir* quoting this passage reads the word translated "difference of opinion" as *Ikhṭikāl*=confusion, disorder, tumult. See below Texts IV and V..

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in an unrestricted sense of the like of it to the Deputies in this age.

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And there is no special text with regard to this question so far as our research goes, and similarly so far as the research of our abovementioned master and that of Shaykh Zayn, author of the *Bahr al-Rā'iq* goes. And verily he (the author of the *Bahr al-Rā'iq*) deduced it juristically and God knows best (*Fatawa Khayriyah*, Vol. I, p. 118, second edition, Government Press, Būlāq, Cairo).

TEXT IV.

قوله دهبا تببه لابد منه الم قال الهمي اقول و في متأوي
 شيخنا محمد بن سراج الدين الحانوني سؤال في قوله ان
 الاستبدال ادما يكون من القاضي حيث لم يكن هناك شرط وافق
 حل المرأة قاعي القضاة ام لا يختص به هل يشترط أن يكون ذهب
 في منشوره ذلك أم لا الجواب لم نر من قيد باشتراط أن يكون في
 منشوره كما قد يراه في ولية اذن الصغار و في الاستخلاف فیابغي
 أن يعمل بالطلاق و بما يدل على عدم اختصاص قاضي القضاة
 بالاستبدال بل كما يكون منه يكون من وليه أنه لا يجوز استخلافه
 لذلك إلا أن فرض اليه ذاك من السلطان و حيث فرض اليه ذلك
 ذات ولية فليه مسندة إلى أن السلطان فيكون ذاماً مقام
 مستحبه الذي هو قاعي القضاة كلامه جواهير في الاستخلاف ولذا
 ثم معهده كلامه أن القاعي إذا شرط في منشوره تزويج
 الصغار والصغار كل له ولية ذات امتداده يجعلها ابن السلطان
 للقاضي في التزويج ديناً في مباشرة و متصورة كذلك لقيمة
 مقامه و أن جاز للنائب مباشرة الوكالة مع ذلك فهم أن يكون الشرط
 للقاضي في منشوره وكيف بغيره وعبارة ابن الهمام في تزويج

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نزاع الصغير والصغار ثم من أصله القاضي يجعلشرطأعني قوله الذي شرط في عهدة الخ راجعا إلى القاضي فقط ولم

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يجعل راجعه ولم يصر عليه حيث لم يترد عنهما نعم قد رقع في عبارة بعضهم أنه اخر الشرط عن القاضي ومن نصبه فكانت عبارة معتملة أو جوهرة إلى القاضي لكونه الأصل أولهما إلا لكن ذكر في التحريف أول الوقف عبارة البحر المذكورة هنا ثم قال فهو صريح في أن زائب القاضي لا يملك ابطال الوقف و إنما ذلك حامس بالأصل الذي ذكر له السلطان في منشوره نصب الأرضيات وفرض له أمره لا وقف وينبعي الا عتماد عليه و ان يبحث فيه شيئا الدين محمد بن سراج الدين العازمي لما في اطلاق هذه النوايب في هذا الزمان من الاحتلال و المسئلية لانص فيها شخصها فيما اطلعنا عليه و كذلك فيما اطلع عليه شيئا ذكره والشيخ زين صاحب البحر و إنما استخرجها تفقها والله سبحانه و تعالى أعلم منحة الشاواق الموروثة على ما يمشي الجرم الخامس من البحر الرابع صفحه ٢٥٤ مطبوع مصر *

"Here there is a point, etc." Al-Ramli * says—I say, in the collection of *fatwas* of our master Muhammad b. Sirāj al-Din al-Hānūti there is a question with regard to their (jurists') statement that the *istibdāl* (exchange) can be effected by the Qadi when there is no stipulation of the *wākif* [to that effect]. Is the Chief Qadi meant thereby or is it not peculiar to him, and is it a condition that it should be written in his letters patent?

The answer:—We have not seen any one restricting it to the condition that it should be in his letters

patent as they (jurists) have restricted it with regard to the power of giving minor girls in marriage and with regard to (the Qadi's power of appointing) his substitute, successor. Therefore it should be acted upon in an unrestricted, general sense. And amongst that which indicates that (the power of effecting) *istibdāl* does not peculiarly belong to the Chief Qadi but rather it (*istibdāl*) can be as much effected by his deputy as by himself, is the fact that it is not lawful for him to appoint his deputy as his substitute, successor, unless the power of doing so is delegated to him by the Sultan. And when the power of doing so is delegated to him (Qadi) then the authority of his deputy is based on the permission of the Sultan, and he (the deputy) stands in the stead of the person appointing him his deputy, viz., the Chief Qadi, as they (jurists) have expressly laid it down regarding the question of appointing a successor. Therefore what is understood by their (jurists) statement is that when in the letters patent of the Qadi, the power of giving minor boys and girls is stipulated he (Qadi) has that power and then the person appointed by him. So they (jurists) have made the permission of the Sultan to the Qadi as to giving in marriage sufficient with regard to his (Qadi's) conducting it as well as (with regard to) the person appointed by him (Qadi) because of his standing in his (Qadi's) stead. And when the conducting of marriages is lawful for the deputy with their (jurist's) express declaration that it should be stipulated for the Qadi in his letters patent, then how without it? The text of Ibn al-Hammām regarding the order of succession of matrimonial guardians is as follows: Then the Sultan, then the Qadi if the (power of) giving in marriage of minor girls and boys is stipulated in his patent of office, then the person appointed by the Qadi. Thus he (Ibn al-Hammām) has made the

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stipulation, I mean, his statement, "if stipulated in his patent of office," refer to the Qadi only and not to him and to the persons appointed by him, because he (Ibn al-Hammām) has not put it (the stipulation) after both of them (*i.e.*, after the word "Qadi" and "the person appointed by him").

Yes it is true that in the writings of some of them (jurists') is to be found that he (Ibn al-Hammām) has put the stipulation after the word "Qadi" as well as "the person appointed by him." Thus the text is capable of being made to refer to the Qadi as he is the original (incumbent) or to both of them. *Finis.* But he (al-Ramli) has stated in the *Khayriyah* (collection of his Fatwas, see the Text III) towards the commencement of the chapter on *wakf*, the text of the *Bahr al-Rā'iq* mentioned here. Then he says, "Thus it (*i.e.*, *Bahr al-Rā'iq*) is explicit regarding that the Deputy Qadi has not the power of setting aside the *wakf* and that that is peculiar to the original (Qadi) in whose letter of appointment the Sultan has mentioned the appointment of *mutawallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be placed upon this, although our master Shaykh Muhammad b. Sirāj al-Dīn al-Hānūtī has examined, criticised, discussed it because of the confusion* with regard to the application, in an unrestricted sense, of the like of it to the deputies in this age. And there is no special text with regard to this question so far as our research goes, and similarly so far as the research of our above mentioned master and that of Shaykh Zayn, author of the *Bahr al-Rā'iq* goes. And verily he (the author of the *Bahr al-Rā'iq*) deduced it juristically and God knows

* The word translated 'confusion' here is (*ikhtilāf*) in the original, while in Text III the word used is *ikhtilāf* 'difference of opinion.'

best (*Manhat al-Khāliq*), marginal gloss on the *Bahr al-Rā'iṣ* by Ibn 'Ābidīn the author of *Radd al-Muhtār*, Vol. V, Cairo Ed., Text V.

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TEXT V.

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قوله للقاضي قيده في البحر بقاضي القضاة أخذها من عبارة حامع
الخصوصون التي تدعى لها قبل ورقة ثم قال د على

هذا فقولهم في لاستدانته بأمر القاضي المراد به
قاضي القضاة وهي كل موضع ذكره القاضي في
امور الا وقاف بخلاف قولهم و ادا رفع اليد
حكم قاض امها بفاته أعم كما لا يخفى اه قال
في الخبرة وهو مروع في أن زائب القاعدي لا
يملك ابطال الرقف و اما ذلك خاص بالأصل
مطلا به الموارد
قاضي القضاة اه
ه في كل موضع
ذكرها القاضي في
امور الا وقاف
مطلا به زائب
القاضي لا يملك
إبطال الرقف

الذى ذكر اه السلطان في منشورة منصب الولاية والا رصياد و ثونس
اه صور الا وقاف وينبغى الاعتماد عاوه و آن بعثت به شيخة
لشيخة محمد بن سراج الدين الحموي لما في اطلاق مقامه
للزباب في هذا السرمان من الا خذلان والمسدة لانص فيها
خصوصها فهم ما اطلقها عليه وكذا ذى اطاخ عليه شيختنا المذكورة
صاحب البحر و الماء استخرجها نعها اه و نقل في حاشيته على
البحر عبارة شيخة الحموي بظواهرها وأقرها و من جملتها و مما يدل
علي علم اختصاص قاضي القضاة باستبدال الرقف بل يجوز من
نائبه أيضا أن نائبه فائم مقامه و لذا كان الفروع من كلامهم انه
إذا خرط في منشورة تزويج الصغار و الصغار كان لمنصوبه ذلك
و عبارة ابن الهمام في ترتيب الولاء في الداج ثم السلطان
ثم القاضي ادا شرط في عهده ذلك لم من نصبه القاضي اه

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"Then the power of appointment is for the Qadi."

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"For the Qadi"—In the *Bahr al-Rā'iq*, he has restricted it to the Chief Qadi, relying on the passage from the *Jāmi 'al-Fusūlayn* quoted by us one leaf back. Then he (the author of the *Bahr al-Rā'iq*) states, "According to this in their (jurists') statement regarding obtaining a loan with the sanction of the Qadi, by 'Qadi,' the Chief Qadi is meant and in every place where the Qadi is mentioned regarding *wakf* affairs. This is contrary to their (jurists') statement," when the order or judgment of a Qadi is brought before him, is referred to him, he executes it." For this is general. It is stated in the *Khayriyah*. "Thus it (i.e., *Bahr al-Rā'iq*) is explicit regarding that the Deputy Qadi has not the power of setting aside the *wakf* and that that is peculiar to the original (Qadi) in whose letter of appointment the Sultan has mentioned the appointment of *mutawallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be placed upon this, although our master Shaykh Muhammad b Sirāj al-Din al-Hānūtī has examined, criticised, discussed it because of the confusion (*ikhtilāt*) with regard to the application in an unrestricted sense of the like of it to the deputies in this age. And there is no special text with regard to this question so far as our research goes and similarly so far as the research of our above-mentioned master and that of Shaykh Zayn, author of the *Bahr al-Rā'iq* goes. And verily he (the author of the *Bahr al-Rā'iq*) deduced it juristically. And he (the author of the *Fatawa Khayriyah*, Khayr al-Din al-Ramli)

has quoted, in his marginal gloss on the *Bahr al-Rā'iq*, the text of his master al-Hānūtī *in extenso* and has confirmed it (see Text IV). And of it (the text) and amongst what indicates that (the power of effecting) *istibdāl* of wakf is not peculiar to the Chief Qadi but rather is lawful to his deputy as well, is the fact that his deputy is his *locum tenens*. Therefore what is understood by their (jurists') statement is, that when (the power of) giving minor girls and boys in marriage is stipulated in his letters patent, that (power) belongs to the person appointed by him. The text of Ibn al-Hammām as to the order of succession of matrimonial guardians is "Then the Sultan, then the Qadi if that is stipulated in his patent of office, then the person appointed by the Qadi. End of the quotation in substance. (Note.) But he (the author of the *Anfa al-Wasā'l*) has stated that the governance of the *wakf* is for the Qadi even though the Sultan has not stipulated it in his investiture and has not ascribed, assigned it to any one. And this is contrary to what is reported, quoted in the *Jami 'al-Fusulyan* (*Radd al-Muhtār*, Vol. III, p. 635, Ed. Constantinople).

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TEXT VI.

قوله ولرضم القاضي للقيده نفقة الخ مال في البحر و هنا
 تنبئه لا بد منه وهو ما المراد بالقاضي الذي يملك نصب
 الرصي والمترلي و يكون له النظر على الا وراف فلت هو قاضي
 القضية و كل فاص لما في جامع الفصول من الفصل السابع
 والعشرين لو كان الرصي او المترلي من جهة العايم فالادنى ان
 يكتب في العدوك والسدادات وهو الرصي من جهة عايم له
 ولبة نصب الرصي والمترلي لانه لو انتصر على قوله وهو الرصي
 من جهة العايم بما يكون من حاكم ليس له ولبة نصب الرصي

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فإن القاضي لا يملك نص الرصي والمترولي إلا إذا دُن ذكر
 التصرف في إلا وراف و لا هدام منصرحاً عليه في منشورة
 نصار حكم دائم القاضي فإنه بدل فيه أن يذكروا أن فلاناً
 القاضي مأذن له بلا رابة نسراً عن هذا الرهم ... المترو المثاني
 من الطعناتى صفحه ٥٦٧ مطبوع مصر *

"If the Qadi associates with the *mutawalli* a reliable person." It is stated in the *Bahr al-Rā'iq* [Text II is quoted here]. Al-Tahtāwi's Commentary on the *Durr al-Mukhtār*, Vol. II, p. 567 (Govt. Press, Bulāq, Cairo).

TEXT VII.

سئل..... هل إذا عزل القاضي أو من قدر الواقف نفسه
 وأقام القاضي ناظر إبداه على الوقف
 مطالب الثانوي الذي يملئ
 توقف صحة عرارة نفسه على عام القاضي
 أولاً وبحسب ذراید القاضي آخر و إن لم يكن
 في الا وقت دو فاضي القضاة أو يتوقف ذلك على كونه
 كذلك وما الأربع بقاضي القمامات
 جاب:..... إذا عزل المترولي نفسه عند قاضي القضاة وأقام
 متروليا آخر صحيحاً إذا إذا بلغ القاضي العزل يتعزل والآلا و العرارات
 بقاضي القضاة من نص أنه في منشورة على التصرف في إلا وراف
 إلا وراف أو قال له السلطان جعلتك قاضي القضاة والى في البحر
 وبعثنا تنبية لا بد منه وهو ما المراد بالقاضي الذي يملك نص
 الرصي والمترولي و يكتفى لد المظفر على إلا وراف قلت هو قاضي
 القضاة لا كل قاضي كما في جامع الفصولين من الفصل السادس
 والعشرين أو كذا . الرصي أو المترولي من جهة المحاكم فالارتقى ان

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يكتب في الصك و السجلات وهو الوعي من جهة حاكم له
 ولاية نصب الوعي ولتوابعه لانه او اقتصر على قواده وهو الوعي
 من جهة الحاكم واما لمكون من حاكم لوس انه نصب الوعي
 فان القاعدي لا يملك نصب الوضعي والمترتب عليه الا ان ذكر
 التصرف فيه لا وقاب ولا ينطأ منصوصا عليه في مذكرة فصار
 حكم تأكيد القاعدي فانه لا بد فيه ان يذكرها ان فلان القاعدي
 مائرين بالاذابة تحرزا عن هذا الوهم او ولاشك ان قوى السلطان
 جعلتكم قاضي القضاة فالتنصيص على هذه الاشیاء في
 المنظور كما صرحت به في الخلاصة في مسألة استخلاف القاضي
 و على هذا فقولاً في الاستدامة بأمر القاضي المراد به قاضي
 القضاة : في كل موضع ذكره القاعدي في أمره الا ورافع بخلاف
 قوله و دا ويع ايه عدم ناض امضاه فانه اعم الجزو الثاني
 من الفتاوى المهدوية صفحة ٥٧٦ طبوع مصر *

He was questioned : Is the Qadi's appointment of another person as *mutawalli* valid even if he is not the Chief Qadi, or does it depend upon his being that, and what is meant by the Chief Qadi.

He answered : When the *mutawalli* dismisses himself, resigns his office before, in the presence of the Chief Qadi, and he (the Chief Qadi) appoints another as *mutawalli* it is valid. Similarly when the (news of) dismissal, resignation, reaches the Qadi, he becomes dismissed, otherwise not. By the Chief Qadi is meant the person who is expressly authorised by his letters patent to have the administration of *wakf* properties and orphans, or to whom the Sultan says, "I have made thee Chief Qadi". It is stated in the *Bahr al-Raiq* [Text II is quoted here] (*Fatāwā Mahdiyah*, Vol. II, p. 555, Cairo Ed.).

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TEXT VIII.

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السلطان اذا قال اوجل بعلتك فاذيا ايس له ان يستخلف
اذا اذن له غير ذاك صريعا او دلالة بان يقول له بعلتك
قاضي القضاة لان قاضي القضاة هو الذي يتصرف في القضاة
تقليد او عرلا كذا في الخمسةالجزء الثالث من
القدارى العالى مگيرى صفحه ۳۸۸ مطبع داکته *

When the Sultan says to a man, "I made thee a Qadi," he has not the power of appointing a substitute, successor except when he (Sultan) permits him to do that expressly or by implication by saying "I made thee Chief Qadi;" because it is the Chief Qadi who acts as he pleases respecting Qadis as regards investiture or dismissal. Thus it is laid down in the *Dhakhirah* (*Fatâwa 'Alamgiri*, Vol. III, p. 388, Cal. Ed.).

TEXT IX.

ولا يستخلف قاضي ثالثا الا اذا فرض اليه صريعا كول من
شئت او دلالة كبعنك قاضي القضاة والدلالة هنا اقوى لان
يعنى الله المذكور يملك الا استخلاف لا العزل و في الدلالة
يمكنها انقرنة ول من شئت واستبدل او استخلف من شئت
فإن قاضي القضاة هو الذي يتصرف فيهم مطلقا تقليدا و عزلا ...
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And the Qadi cannot appoint as successor, substitute, a deputy except when (the authority to do so) is delegated to him expressly like, "Appoint whomsoever thou likest, or implicitly, like, "I made thee Chief Qadi". And here the implication is stronger, for in the explicit stated above, he possesses the power of appointing a successor, not that of dismissal.

And in the implicit he possesses both, like his (Sultan's) saying, "Appoint whomsoever thou likest, supersede (substitute) whomsoever thou likest," for it is the Chief Qadi who acts as he pleases respecting them (Qadi) as regards investiture or dismissal (*Durr-al Mukhtar*, p. 529, Ed. Cal.).

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TEXT X.

وَلَا تَصْمِمُ وَلَيْلَةَ الْقَاضِي حَتَّى يَجْتَمِعَ فِي الدَّائِرَةِ شَرْكَطٌ
الشَّهَادَةِ كَذَّا مِنْ الْهَدَايَةِ مِنَ الْإِسْلَامِ وَالْتَّكْلِيفِ وَالْحُرْبَةِ إلَخَ
الْجُوْرُ الْأَلَثُ مِنَ الْعَنَوَى الْعَالَمَغَرِبَيَّةِ صَفَّةٌ ۳۷۸ مُطْبَعُ لِكَتَبَهُ *

The appointment of Qadi is not valid unless the person appointed combines in himself the condition of evidence (Qualifications of a witness) according to the *Hidayah*, viz., Islam, Taklit, freedom, etc. (*Fatawa Alamgiri*, Vol. III, p. 378, Cal. Ed.) cf. Hamilton's *Hedayah* (Grady Ed.) Bk. XX, p. 334.

TEXT XI.

وَذُكْرُ فِي الْمُلْقَطِ ، لَا سَلَامٌ إِلَّا يُسْبَّطُ بِهِ أَىٰ فِي السُّلْطَانِ
الَّذِي يَقْلِدُ كَذَّا مِنَ الْقَاتِلِ حَادِيَةَ ... الْجُوْرُ الْأَلَثُ مِنَ الْعَنَوَى
الْعَالَمَغَرِبَيَّةِ صَفَّةٌ ۳۷۹ مُطْبَعُ لِكَتَبَهُ *

It is stated in *Multaqa* "And Islam is not a condition in him, i.e., in the Sultan who invests (a person with the office of Qadi). Thus it is laid down in the *Tatarkhaniyah*" (*Fatawa Alamgiri*, Vol. III, p. 379, Cal. Ed.)

TEXT XII.

وَذُكْرُ دَلَلِ الْقَضَاءِ مِنَ السُّلْطَانِ الْعَادِلِ وَالْجَاهِزِ وَالْجَافِرِ
دَكْرُ مَسَاعِي دَفْرَةِ لَا إِلَهَ إِلَّا هُنَّ يَعْلَمُونَ عَنِ الْقَضَاءِ بِأَعْلَقِ دَفْرَمِ
دَرَاجَاتِ مَسَاعِي ۴۲۳ مَطْبَعُ لِكَتَبَهُ *

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ATIRANNESSA It is valid to accept the investiture of office of Qadi from a just Sultan and from a tyrant even though an infidel (it is stated by Miskīn and others) except when he prevents him from doing justice, what is right; then it is unlawful (*Durr al-Mukhtār*, p. 521, Ed. Cal.).

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MOKERJEE J. And qualified for it (office of Qadi) is one who is qualified for being a witness. This is contrary to the statement of al-Zaylaī in the (Chapter on) Arbitration to the effect that the investiture of an infidel with the office of Qadi in order to decide between non-Moslems under Moslem protection (*Ahl al-Dhimmah*) is valid" (*Durr al-Mukhtār*, p. 521, Ed. Cal.).

TEXT XIII.

اَنَّمَا اُولُو الشَّيْءَةِ الَّذِي اَدْعَى عَلَى الْمُسَامِينَ كَذَا بِي
الْعَرَاشِيِّ السَّعْدِيِّ وَبِهِ عَلَى اَنَّ الْقَافِيَ يَجُوزُ تَقْلِيدُهُ الْقَضَاءُ
الْحِكْمَمُ بِهِ اُولُو الدِّرْهَمِ ذَكْرُ الرِّيلِيِّ فِي التَّحْكِيمِ .. دِرَاسَتُ الْمُخْتَارِ
مُفْعَلٌ ۖ ۖ مُطْبَعٌ عَلَيْكُمْ ۖ

It is clear from an examination of these texts that, under the Mahomedan Law, that Qadi alone was competent to exercise authority in respect of *wakfs* who was so expressly authorised in his letters patent. There was some difference of opinion upon the question, whether such express authority was needed when a person was explicitly appointed the Chief Qadi ; but even here the balance of opinion of jurists favours the view that power should be expressly conferred on the Chief Qadi to validate the administration of *wakfs* by him. There is also authority to show that the supreme authority in the State, by whom the Qadi is appointed, need not be a Mahomedan, and although there is some divergence of opinion there is also authority to show that the office of Qadi may be held by a non-Moslem for the decision of

disputes between non-Moslems under Moslem protection. As this is a matter regarding religious usages and institutions within the meaning of section 15 of Regulation IV of 1793 the rights of the parties must be determined with regard to the provisions of the Mahomedan Law on the subject (Per Peacock, C.J. in *Kudratulla v. Mahini Mohan* (1). It follows accordingly that a Subordinate Judge, who has not been expressly authorised by the Government to exercise functions in connection with the administration of *wakfs*, is not competent to act in that behalf. Whether a District Judge has implied authority to exercise the functions performed by a Qadi under the Mahomedan Law is doubtful. In respect of *wakfs* which may be described as trusts created for public purposes of a religious nature within the meaning of sub-section 1 of section 92 of the Civil Procedure Code, 1908 the District Judge may be assumed to have been authorised to discharge the functions of a Qadi. The real difficulty arises in the case of private *wakfs*; it is desirable that to cover such cases the Local Government should authorise either District Judges or Subordinate Judges or even Judicial officers of a lower grade, if it be thought desirable, to exercise the function of a Qadi. When authority has been so conferred, a question may arise whether the assistance of the Court is to be invoked by a suit or by an application: see *Mahamid v. Ahmed Bhai* (2). The case before us, however, is reasonably free from difficulty. The Courts below have concurrently found that the *wakf* was public and has thus negatived the fundamental allegation of the plaintiff. The district judge had jurisdiction under section 539 of the Civil Procedure Code of 1882 to appoint the defendant as *mutawalli*. The Subordinate Judge has no authority to recall

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that order and to appoint the plaintiff as *mutawalli*: *Saiyid Ali v. Ali Jan* (1). It might have been otherwise if the suit had been instituted by a person already appointed *mutawalli*, for example by a testamentary instrument: *Mohammad Abdul Majid v. Ahmad Saeed* (2). The remedy of the plaintiff obviously is to proceed under section 92 of the Code of 1908 and to get herself appointed *mutawalli* on the ground that she had the preferential right to the office as the sole surviving descendant of the founder at the time of the death of the last *mutawalli*. In fact, she would have been so appointed in the suit mentioned if she had not asserted at the time that the *wakf* was private. It would be open to her now, however, to accept the decision in this suit that the *wakf* is public and to proceed on that basis under section 92.

The inference follows that in the present suit as framed the plaintiff cannot be appointed *mutawalli* and the suit has consequently been rightly dismissed. The appeal is accordingly dismissed with costs.

BEACHCROFT J. I agree that this appeal must be dismissed for the reasons given by my learned brother. I express no opinion as to the position of the District Judge with reference to private *wakfs*.

S. K. B.

Appeal dismissed.

(1) (1912) I. L. R. 35 All. 98.

(2) (1913) II All. L. J. 673.

PRIVY COUNCIL.

JAMAL

P.C.^o
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v.

MOOLLA DAWOOD SONS & CO.

Oct 22;
Nov.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Damages—Measure of damages—Breach of contract for sale of shares—Breach by buyer—Sale by vendor at various dates after breach at higher prices than those prevailing at date of breach—Sale not in mitigation of damages—Buyer not entitled to benefit of higher rates of sale—Contract (Act IX of 1872) ss. 73 and 107.

Under contracts made at various dates between April and August 1911, the appellant agreed to sell to the respondents certain shares to be delivered on 30th December 1911. On that date the shares had fallen largely in value, and on the appellant tendering the shares the respondents declined to take them. Negotiations up to 26th February between the parties not resulting in a settlement, the appellant, after demanding a sum representing the difference between the agreed price of the shares and their value at 4-3 per share, the market price at the date of the breach of the contract, sold the shares at various dates from 28th February to October, in every case except one at a higher price than 4-3. In a suit brought on 22nd March 1912 by the appellant for the amount demanded, the Chief Court allowed the respondents the benefit of the increased prices received by sale of the shares by giving them, in mitigation of damages, credit for the prices realised over and above the market price on 30th December, the date of the breach:—

Held by the Judicial Committee (reversing that decision), that on the breach by the respondents their contractual right to the shares fell to the ground; and the appellant thereafter sold shares belonging to himself in order to ascertain the loss arising by reason of the respondents not completing at the contract price. If after the breach the seller holds on to the shares, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer—the seller cannot recover from

* Present: VISCOUNT HALDANE, LORD WREXHAM, SIR JOHN EDGE AND
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the buyer the loss below the market price at the date of the breach, if the market falls, nor is he liable to the buyer if the market rises.

A plaintiff who sues for damages is bound to take all reasonable steps to mitigate the loss consequent on the breach, and cannot claim any sum due to his own neglect. But the loss to be ascertained is the loss at the date of the breach.

Staniforth v. Lyall (1) followed.

The fact that by reason of the loss of the contract which the defendant has failed to perform, the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract.

Yates v. Whyte (2), *Braiburn v. Great Western Railway Co.* (3) and *Jelsen v. East and West India Dock* (4) followed.

The market rate at the breach is the decisive element.

Rudocanachi v. Milburn (5) and *Williams v. Agius* (6) followed.

This principle applies to a breach by either seller or buyer.

Neither section 73 nor 107 of the Contract Act (IX of 1872) could be referred to as in favour of the respondents: the former was only declaratory of the right to damages, and the latter was inapplicable to the present case.

APPEAL 70 of 1911 from a judgment and decree (21st July 1913) of the Chief Court of Lower Burma on its Appellate Side, which affirmed a judgment and decree (18th December 1912, and 8th January 1913) of the same Court on its Original Side.

The plaintiff was the appellant to His Majesty in Council.

The following was the judgment of the Chief Court (H. S. HARTNOLL, officiating Chief Judge, and C. YOUNG, Judge) appealed from, in which the facts are sufficiently stated:—

HARTNOLL, officiating Chief Judge, (Youxa J. concurring) "In this suit appellant sued to recover from the respondents Rs 1,09,218-12 compensation for breach of contract. His case was that by six contracts between April and August 1911, he contracted to sell 23,500 shares in the British Burma Petroleum Company at certain rates per share which were

(1) (1830) 7 Bing. 160.

(4) (1875) L. R. 10 C. P. 300

(2) (1838) 4 Bing. N. C. 272.

(5) (1886) L. R. 18 Q. B. D. 67.

(3) (1874) L. R. 10 Exch. 1.

(6) [1914] A. C. 10

set out and for delivery on or before the 30th and 31st December 1911. The market price on the 30th December was 4-3—a price that was very much less than the prices contracted for. The shares were tendered to respondents but not taken delivery of or paid for. Appellant therefore sued to recover Rs 1,09,218-12 the difference calculated on the amount due taking the contract prices and the market value of the shares on the 30th December calculated at 4-3 a share. The appellant sold 100 of the shares on the 28th February 1912 at 4-3 and the rest of the 23,500 on dates between April and October 1912 at prices higher than 4-3 but lower than the contract prices arranged between him and respondents except in one instance. In this way appellant realized for the shares Rs 1,04,261-10-9. At contract prices appellant should have received Rs. 1,84,125-10. The difference is Rs 79,862-15-3 and this is the sum for which a decree has been given him by the learned Judge on the Original Side. Appellant lays this appeal claiming a further sum of Rs. 20,355-14-9 the difference between the amount claimed and the sum awarded.

"On the 30th December 1911, when appellant tendered the shares to respondents, his advocates wrote. 'Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo responsible for all losses sustained thereby.' On the 2nd January 1912, he again through his advocates expressed the intention of re-selling the shares and instituting a suit against respondents for the recovery of any loss which might result from that course. On the 4th January, he reiterated his intention to do so. Nothing was then done till the 26th February 1912 when appellant's advocates wrote to respondents and claimed Rs 1,09,219 & the amount arrived at by deducting Rs. 74,906-4 the value of the 23,500 shares at 4-3 a share from Rs 1,84,125-10 the agreed price of the shares. In assessing the damages the learned Judge on the Original Side has given respondents the benefit of the higher prices realized by appellant when he sold the shares. His reasons for doing so were as follows:—'One of the 'rules' on the back of the contract notes states that in default of payment for the shares on the date of settlement or by noon on the day following, the seller shall have the option of re-selling the shares by auction at the exchange at the next meeting, and any loss arising shall be recoverable from the buyer. The plaintiff had no other right of re-sale beyond that. At the time that he first gave notice of his intention to resell he still had that right, but he subsequently failed to exercise it, i.e., though he has sold these shares at a higher rate than the rate of the due date, he did not purport to resell them as against the defendant. Can then the defendant claim to have the benefit of the higher prices realized by the plaintiff? I think they can. If a seller having the right of re-sale, elects to exercise such right he must

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give notice of his intention to re-sell ; and having done so he has made his election between the two measures of damages that were open to him. After giving such notice, it is his duty to re-sell either at the time (if any) appointed by the contract or within a reasonable time after the date of the breach. If he delays, he takes upon himself all risk, arising from further depreciation. And if he sells at a higher rate, such sale will be taken to be a re-sale in pursuance of his notice : for otherwise he would be allowed to benefit by his own wrong!"

After reading the grounds of appeal, the judgment proceeded :—

"There is no doubt as to what appellant's true measure of damages is. It is the difference between the contract price and the market price when the contracts ought to have been completed,—that is to say, the date of the breach the 30th December 1911, for the appellant could then have taken the shares into the market and obtained the current price for them. This was the principle followed in the case of *Pott v. Flather* (1). But it was argued that as in the beginning appellant chose to proceed under section 107 of the Indian Contract Act, he should be kept to such choice. It is clear that, though at first he expressed the intention of pursuing the course set out in section 107, he did not keep to his intention, for, when he brought his suit, he had only sold 100 shares, and this was on 28th February, and he sued for his whole measure of damages. Appellant's counsel urged that, though appellant at first expressed the intention of following the course laid down by section 107, he was not bound to carry out such intention and could change his mind if he liked. This view appears to be correct. The words of section 107 are permissive and not compulsory. In the case of *Buldeo Dose v. Horce* (2), the view was taken that section 107 does not deprive an unpaid vendor of goods of any other remedy he may have. I am therefore unable to agree with the views expressed by the learned Judge on the Original Side as to appellant being bound to proceed under section 107.

"But I think there is abundant authority for holding that the respondents are entitled to the benefit of the higher prices realized by appellant in mitigation of the sum payable by them as damages. The subject is dealt with at pages 771 and 772 of *Leake on Contracts* (6th Ed.), and page 207 of *Mayne on Damages* (8th Ed.).

"I would especially refer to the following cases :—

"In *Oldershaw v. Holt* (3), where the plaintiff claimed as damages certain moneys from the defendant owing to his failing to carry out certain terms

(1) (1847) 16 L. J. Q. B. 366.

(2) (1889) I. L. R. 6 Calc. 64.

(3) (1810) 12 A. & E. 590.

of a building lease and where plaintiff entered into a new agreement with another tenant, the jury were directed to have regard to the new and ultimately more advantageous agreement entered into in calculating the amount of damages due. In *Smith v. McGuire* (1), which was a suit to recover damages for failure to carry out the terms of a charter party, that is, to load a ship with a cargo of oats, Martin B. said. 'It would be doubtful whether a party who breaks a contract has a right to say to a person with whom he breaks it—I will not pay you the damages arising from my breach of contract, because you ought to have done something else for the purpose of releasing me from it. I am not satisfied that the person who breaks a contract has a right to insist on that at all; but if the ship had earned anything the defendant would be entitled to a deduction in respect to that.' Again in *Brace v. Calder* (2), where the plaintiff was employed by the defendants, a partnership consisting of 4 members as manager of a branch of their business and the agreement was that he was to be employed for a certain period, but before that period had expired two of the partners retired and the business was transferred to and carried on by the other two, in an action for wrongful dismissal it was held that the plaintiff was only entitled to nominal damages as the continuing partners were willing to employ the plaintiff on the same terms as before for the remainder of the period and so the plaintiff would have suffered no damage. In that in the present case the appellant reduced his loss by selling the shares at a higher price than obtained at the date of the breach. I think it only equitable to give the respondents the benefit of the higher prices realized. I would therefore dismiss the appeal with costs."

On this appeal,

Sir H. Erle Richards, K. C., and F. J. Coltman, for the appellant, contended that he was entitled to recover the whole of the difference between the contract price of the shares and the market rate on 30th December 1911. That was the proper measure of damages; and the Chief Court had erred in holding that the appellant should give credit for the profit made by him on the sale of the shares after breach. The respondents were not entitled by any principle of equity or otherwise to get in mitigation of damages the benefit of the prices higher than the contract price.

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obtained for the shares on and after 28th February 1912. It is said that the appellant elected to proceed under section 107 of the Contract Act (IX of 1872), and intimated his intention to do so, and that he should be bound by such intimation: but, it was submitted, he was under no obligation to sell as intimated or to sell at all, and that section 107 was not applicable.

[LORD HALDANE referred to the *British Westinghouse Company* (1). The resale outside the transaction had nothing to do with it, and could not be taken into consideration.]

The principle to be followed is that laid down in *Pott v. Flather* (2). The position between the seller and the purchaser was fixed once for all as that on 30th December 1911. After the breach of contract on that date, the shares belonged to the appellant, and when he sold them he did not do so under the contract. Any loss or gain must be loss or gain at the date of the breach. It was not proved or even suggested that the respondents were at all prejudiced by the appellant not selling as he intended.

Frank Dodd, for the respondents, contended that the damages should be such as would compensate the appellant for his loss—the loss he has actually sustained. The appellant elected to exercise the rights given him by the rules endorsed on the contract, and gave notice to the respondents of his intention to do so, and he was bound to sell and realize the shares in accordance with such notice, and to account to the respondents for the proceeds. He made the sale, it was submitted, according to the intention of the parties, and rightly treating the shares as being the respondents. After the breach there was evidence of negotiations being still carried on between the parties.

(1) [1914] A. C. 510, 520.

(2) (1847) 16 L. J. Q. B. 366.

negotiations on which depended the appellant's right to exercise his power of re-sale and they extended up to the 26th February. The appellant's right to sell was suspended pending such negotiations; and he was bound to take all reasonable means of mitigating the damages consequent on the breach by the respondents; and the respondents were, it was submitted, entitled to an account, and to the benefit of anything done in mitigation of the damages. Reference was made to section 73 of the Contract Act.

The appellant was not called on to reply.

The judgment of their Lordships was delivered by

LORD WRENBURY. Under six contracts made at various dates between April and August 1911 the plaintiff (the appellant) was seller to the defendants of certain 23,500 shares at prices amounting in the aggregate to Rs. 1,84,125-10. The date for delivery was the 30th December 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran: "by auction at the Exchange at the next meeting," &c.

By the 30th December the shares had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding: "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo, responsible for all losses sustained thereby." The purchasers did not pay the sum demanded. They set up a contention that the seller was indebted to them on another transaction, and they sent cheques for the differential sum of Rs. 75,925-10, and called for a transfer of the shares.

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On the 2nd January 1912 the seller repudiated the claim to a set-off, and repeated : "We have now to give you notice that our client intends to re-sell these shares and to institute a suit against you for the recovery of any loss which may result from that course." The purchasers stopped payment of the cheques, and nothing turns upon the fact that they were given.

Negotiations ensued between the parties which extended to 26th February 1912. On that day the seller, by his agents, wrote to the purchasers a letter as follows :—

" 71, Phyre Street, Rangoon,
26th February 1912.

" Messrs. Moilla Dawood and Sons.

" Dear Sirs,

" We are instructed by Mr. A. K. A. S. Janal that he has not hitherto taken any steps to enforce his claim against you for failing to pay for and take delivery of 23,500 shares in the British Burma Petroleum Company, Limited, at your request, in order that his claim might, if possible, be settled. It now appears that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs. 1,09,219-6 is paid to him by way of compensation before the end of this week.

The amount claimed is arrived at by deducting Rs. 74,906-4, the value of 23,500 shares at 4s. 3d., from Rs. 1,84,125-10, the agreed price of the shares.

Yours faithfully,
GILES AND COLTMAN."

The 1s. 3d. a share there mentioned was the market price of the shares on the 30th December.

On the 22nd March the seller commenced a suit to recover Rs. 1,09,218-12 as damages for breach measured by the difference between the contract price of the shares and their market price (4s. 3d. a share) on the date of the breach, the 30th December 1911. This is (with a trifling variance) the same sum and arrived at in the same way as the Rs. 1,09,219-6 mentioned in the letter.

Immediately after the letter of the 26th February, 1912, viz., on the 28th February, the seller commenced to make sale of the shares. He sold them all at various dates from the 28th February onwards. In one case the sale was at less than 4s. 3d. (viz., at 4s.). In one case it was at 4s. 3d. In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realized, by giving him credit in reduction of the damages for the increased prices in fact realized over the market price at the 30th December, the date of the breach. The appellant contends that this is wrong.

Their Lordships will first deal with the contractual term as to re-sale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was, in their Lordships' opinion, only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price, but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price. Their Lordships are unable to agree with the original Judge that the plaintiff's letters of the 30th December and 2nd January amounted to an election to take a measure of damages to be arrived at by a resale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to resale.

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The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth v. Lyall* (1) is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract: *Yates v. WhYTE* (2),

(1) (1830) 7 Bing. 169.

(2) (1838) 4 Bing. N. C. 272.

Bradburn v. Great Western Railway (1), *Jebson v. East and West India Dock* (2).

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The decision in *Rodocanachi v. Milburn* (3) that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams Agius* (4). The breach in *Rodocanachi v. Milburn* (3) was breach by the seller to deliver, but in their Lordships' opinion the proposition is equally true where the breach is committed by the buyer.

The respondents further contend that sections 73 and 107 of the Indian Contract Act, or one of them, is in their favour. As regards section 107, their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them in transitu. The section follows upon sections dealing with those subject matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares.

As regards section 73, it is but declaratory of the right to damages which has been discussed in the course of this judgment.

Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach, the seller remained entitled to the shares and became entitled to damages such as the law allows. The first of these two properties, viz., the

(1) (1874) L. R. 10 Exch. 1.

(3) (1886) L. R. 18 Q. B. D. 67.

(2) (1875) L. R. 10 C. P. 309.

(4) [1914] A. C. 10.

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shares he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the Original Court and in the Appeal Court discharged, and judgment entered for the plaintiff according to his plaint, and that the respondents ought to pay the costs in the Courts below and of this appeal.

Appeal allowed.

Solicitors for the appellant : *Arnold & Son.*

Solicitors for the respondents : *Bramall & White.*

J. V. W.

APPELLATE CIVIL.

Before Mookerjee and Newbould J.J..

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July 7.

ATRABANNESSA BIBI

v.

SAFATULLAH MIA.*

Benamdar—Partition—Joint immovable property, suit for partition of.

A *benamdar* cannot maintain a suit for partition of joint immovable property.

Basu Pillar v. Ram Krishna (1), *Baburam v. Ram Sahai* (2), *Sreenath Nag v. Chundernath Ghose* (3), *Bhoobunnessur Roy v. Juggessuree* (4), *Sachitananda v. Baloram* (5), *Hara Gobinda Saha v. Purna Chandra Saha*

* Appeal from Appellate Decree, No. 2673 of 1912, against the decree of C. N. Mosey, District Judge of Mymensingh, dated March 5, 1912, affirming the decree of Behari Lal Chatterjee, Subordinate Judge of Mymensingh, dated April 24, 1911.

(1) (1890) 1 C. W. N. 135. (3) (1872) 17 W. R. 192.

(2) (1905) 8 C. L. J. 305. (4) (1874) 22 W. R. 413.

(5) (1897) I. L. R. 24 Calc. 644.

- (1), *Allijan Bili v. Rambaran* (2), *Kirtibas v. Gopal Jui* (3), *Meheroonissa v. Huz Churn* (4), *Fuzelun v. Omdak* (5), *Kally Pratama v. Dinnath* (6), *Tamaoonissa v. Woonjulmonee* (7), *Hari Gobind Adhikari v. Alhoy Kumar* (8), *Isur Chandra v. Gopal Chandra* (9), *Baroda v. Dino Banlu* (10), *Mohendra Nath Mooljee v. Kali Prasad Johuri* (11), *Kuthaperumal v. Secretary of State* (12), *Venkatachala v. Subramania* (13), *Laglu v. Balant* (14), *Rajji v. Mahadeet* (15), *Nand Kishore Lall v. Ahmed Ila* (16), *Yad Ram v. Umrao Singh* (17), *Danzelle v. Kedarnath* (18), *Kedarnath v. Danzelle* (19), *Indurbutter v. Mahboob* (20), *Jayaram v. Kadambu* (21), *Purnia v. Torab* (22), *Bugar v. Karam Singh* (23), *Bastruddin v. Mohamed* (24), *Ram Bhuroosee v. Bassesser* (25), *Sita Nath v. Nolin Chunder* (26), *Gopi Nath v. Bhugat Pershad* (27) and *Bhola Pershad v. Ram Lall* (28) referred to.

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SECOND APPEAL by Atrabani Nezza Bibi, the plaintiff.

This second appeal arises out of a suit for partition. The facts are shortly these. Mouza Dhubria was *lakhi-raj*-property of the principal defendants and the *pro forma* defendant No. 23. A portion of this mouza (which is in dispute) was washed away by the river Jumna but afterwards was re-formed. After the re-formation a dispute arose between the owners and a case, under section 145 of the Criminal Procedure Code, was instituted and the re-formed land was attached under section 146 of the Code on the 18th of July 1889. In

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| (1) (1909) 11 C. L. J. 47. | (15) (1897) I. L. R. 22 Bom. 672. |
| (2) (1910) 12 C. L. J. 357. | (16) (1895) I. L. R. 18 All. 69. |
| (3) (1913) 19 C. L. J. 193 | (17) (1899) I. L. R. 21 All. 380. |
| (4) (1868) 10 W. R. 220. | (18) (1871) 7 B. L. R. 720; |
| (5) (1868) 11 B. L. R. 60 note. | 16 W. R. 186. |
| (6) (1873) 1 B. L. R. 56, 64. | (19) (1873) 20 W. R. 352. |
| (7) (1873) 20 W. R. 72. | (20) (1875) 24 W. R. 41. |
| (8) (1859) I. L. R. 16 Calc. 364. | (21) (1871) 7 B. L. R. 723 note. |
| (9) (1897) I. L. R. 25 Calc. 98. | (22) (1865) 3 Wyman's Rep. 36. |
| (10) (1898) I. L. R. 25 Calc. 874. | (23) (1907) 2 P. W. R. 26. |
| (11) (1902) I. L. R. 30 Calc. 265. | (24) (1903) 12 C. W. N. 402. |
| (12) (1906) I. L. R. 30 Mad. 245. | (25) (1872) 18 W. R. 454. |
| (13) (1910) 8 Mad. Law Times 377. | (26) (1879) 5 C. L. R. 102 |
| (14) (1897) I. L. R. 22 Bom. 820. | (27) (1884) I. L. R. 10 Calc. 597. |
| (28) (1896) I. L. R. 24 Calc. 34. | |

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" "
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1901 two title suits were brought by some of the owners in respect of the land in dispute: one in Subordinate Judge's Court and another in the Munsif's Court. The latter was subsequently transferred to the Court of the Subordinate Judge and both the suits were tried together in that Court. The parties, however, compromised both the suits and filed a *suleh-namah* defining their respective shares. On the 23rd of March 1904, the suits were decreed in terms of that *suleh-namah*, and the land was released from attachment. During the time that the land was under attachment it was let out in *ijara* by the Government to a certain person for a certain period. In the *suleh-namah* referred to the share of the *pro forma* defendant No. 23 was determined to be 14 gundas 1 kag. The defendant No. 23 conveyed this share of his to the plaintiff by a registered *kabala* dated the 30th April 1906. Subsequently Golam Sabdar Kazi (predecessor of the defendants Nos. 11 to 20) brought a suit for partition of the land in dispute in which the plaintiff was not made a party and obtained a decree. The plaintiff, therefore, brought this suit for partition of land in dispute alleging that the land was her *jote* land of which she had been in possession in *jote* rights from the time of the *ijara*. The defendants Nos. 6, 7, 11, 12, 13, 18, 19, 20 and 21 contested the suit. Other defendants did not appear, though duly summoned.

The main contentions of the defendants were that the *kabala* relied upon by the plaintiff was a mere *benami* one; that the plaintiff had no *jote* right and that the plaintiff was bound by the decree in the partition suit No. 77 of 1907.

The Subordinate Judge dismissed the suit with costs.

The plaintiff, thereupon, appealed to the District

Judge who dismissed the appeal with costs. Hence this second appeal.

Babu Ram Chandra Majiemdar and *Babu Dhiren-dra Lall Khaslagir*, for the appellant.

Babu Dwarka Nath Chakravarti and *M. Nur-uddin Ahmed*, for the respondents.

Cur. adv. vult.

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r.
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MOKERJEE AND NEWBOULD JJ. A question of law of first impression has been raised in this appeal which has been preferred by the plaintiff in a suit for partition of joint immovable property. On the 30th April 1906, the plaintiff took a conveyance in respect of a share of the disputed land from her brother. On the 28th September, 1909, the plaintiff instituted this suit for partition and joined her vendor as *pro forma* defendant. The contesting defendants resisted the claim on the ground, amongst others, that the sale was a fictitious transaction and that the plaintiff as the nominal owner was not entitled to maintain the suit. The Courts below have concurrently found upon the facts in favour of the defendants and have dismissed the suit. The question thus arises, whether a *benamidár* can maintain a suit for partition of joint immovable property.

On behalf of the appellant, reference has been made to the cases of *Basi Poddar v. Ram Krishna* (1) and *Baburam v. Ram Sahai* (2) where the right of a *benamidár* to apply for reversal of an execution sale of land under section 310A of the Code of 1882 was sustained, as also to the decisions in *Sreenath Nag v. Chandra Nath* (3), *Bhoobunnessur v. Juggessuree* (4), *Sachitananda v. Baloram* (5), *Haragobinda v. Purna*

(1) (1896) 1 C. W. N. 135.

(3) (1872) 17 W. R. 192

(2) 8 C. L. J. 305.

(4) (1874) 22 W. R. 413

(5) (1897) I. L. R. 24 Calc. 644.

1915 1901 two title suits were brought by some of the owners in respect of the land in dispute: one in Subordinate Judge's Court and another in the Munsif's Court. The latter was subsequently transferred to the Court of the Subordinate Judge and both the suits were tried together in that Court. The parties, however, compromised both the suits and filed a *sulehnamah* defining their respective shares. On the 23rd of March 1901, the suits were decreed in terms of that *sulehnamah*, and the land was released from attachment. During the time that the land was under attachment it was let out in *ijara* by the Government to a certain person for a certain period. In the *sulehnamah* referred to the share of the *pro forma* defendant No. 23 was determined to be 11 gundas 1 kag. The defendant No. 23 conveyed this share of his to the plaintiff by a registered *kabala* dated the 30th April 1906. Subsequently Golam Sabdar Kazi (predecessor of the defendants Nos. 11 to 20) brought a suit for partition of the land in dispute in which the plaintiff was not made a party and obtained a decree. The plaintiff, therefore, brought this suit for partition of land in dispute alleging that the land was her *jote* land of which she had been in possession in *jote* rights from the time of the *ijara*. The defendants Nos. 6, 7, 11, 12, 13, 18, 19, 20 and 21 contested the suit. Other defendants did not appear, though duly summoned.

The main contentions of the defendants were that the *kabala* relied upon by the plaintiff was a mere *benami* one; that the plaintiff had no *jote* right and that the plaintiff was bound by the decree in the partition suit No. 77 of 1907.

The Subordinate Judge dismissed the suit with costs.

The plaintiff, thereupon, appealed to the District

Judge who dismissed the appeal with costs. Hence this second appeal.

Babu Ram Chandra Majumdar and *Babu Dharendra Lall Khaslagir*, for the appellant.

Babu Dwarka Nath Chakravarti and *M. Nuruddin Ahmed*, for the respondents.

Cur. adv. vult.

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ATRABAN-
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MOOKERJEE AND NEWBOULD JJ. A question of law of first impression has been raised in this appeal which has been preferred by the plaintiff in a suit for partition of joint immovable property. On the 30th April 1906, the plaintiff took a conveyance in respect of a share of the disputed land from her brother. On the 28th September, 1909, the plaintiff instituted this suit for partition and joined her vendor as *pro forma* defendant. The contesting defendants resisted the claim on the ground, amongst others, that the sale was a fictitious transaction and that the plaintiff as the nominal owner was not entitled to maintain the suit. The Courts below have concurrently found upon the facts in favour of the defendants and have dismissed the suit. The question thus arises, whether a *benamidár* can maintain a suit for partition of joint immovable property.

On behalf of the appellant, reference has been made to the cases of *Basi Poddar v. Ram Krishna* (1) and *Baburam v. Ram Sahai* (2) where the right of a *benamidár* to apply for reversal of an execution sale of land under section 310A of the Code of 1882 was sustained, as also to the decisions in *Sreenath Nag v. Chandra Nath* (3), *Rhoobunmessur v. Juggessuree* (4), *Sachitananda v. Baloram* (5), *Haragobinda v. Putna*

(1) (1896) 1 C. W. N. 135.

(3) (1872) 17 W. R. 192

(2) 8 C. L. J. 305.

(4) (1874) 22 W. R. 413

(5) (1897) I. L. R. 24 Calc. 644.

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Chandra (1), *Alijan v. Rambaran* (2) and *Kirtibas v. Gopal Jiu* (3), where the right of a nominal mortgagee to enforce the security was recognised. On behalf of the respondents, on the other hand, reliance has been placed upon the doctrine now well settled in this Court that a *benamidar* is not competent to maintain a suit for possession of immoveable property: *Meheroonissa v. Hur Churn* (4), *Fuzelun v. Omalih* (5), *Kally Prosanno v. Dinorath* (6), *Tamavonissa v. Wojjulmoneet* (7), *Hari Gobind v. Akhoy* (8), *Issur Chandra v. Gopil Chandra* (9), *Baroda v. Dino Bandhu* (10), *Mohendra Nath v. Kali Proshad* (11). This doctrine is in accord with the pronouncement of the Madras High Court in *Kuthaperumal v. Secretary of State* (12), though possibly a discordant note is sounded in the still later case of *Venkatachala v. Subramania* (13), while a contrary view has been adopted in Bombay [*Daydu v. Balvant* (14), *Rarji v. Mahadev* (15)] and in Allahabad [*Nand Kishore v. Ahmad Ata* (16), *Yad Ram v. Umrao Singh* (17)]. These cases indicate that a distinction has been recognised in this Court between suits for land and suits for money claims, in the determination of the question of the competence of a *benamidar* to maintain a suit; in the former class of cases, the right has been denied; in the latter class of cases the right has been sustained. The substantial question in controversy is, within which of these classes, does a suit for partition

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| (1) (1909) 11 C. L. J. 47 | (9) (1897) I. L. R. 25 Calc. 98. |
| (2) (1910) 12 C. L. J. 357. | (10) (1898) I. L. R. 25 Calc. 874. |
| (3) (1913) 19 C. L. J. 193 | (11) (1902) I. L. R. 30 Calc. 265. |
| (4) (1868) 10 W. R. 220. | (12) (1906) I. L. R. 30 Mad. 245. |
| (5) (1868) 11 B. L. R. 60 note | (13) (1910) 8 Mad. Law Times 377. |
| (6) (1873) 11 B. L. R. 56, 64. | (14) (1897) I. L. R. 22 Bom. 820 |
| (7) (1873) 20 W. R. 72. | (15) (1897) I. L. R. 22 Bom. 672. |
| (8) (1889) I. L. R. 16 Calc. 364. | (16) (1895) I. L. R. 18 All. 69. |
| | (17) (1899) I. L. R. 21 All. 390. |

of land fall. In our opinion, a suit for partition of immoveable property should, for our present purpose, be included in the same category as a suit for possession of land. The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners; or, as has sometimes been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. Partition is thus the division made between several persons, of joint lands which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him; the essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property. No intelligible principle has been suggested whereby an analogy can be established between the process thus described and the enforcement of a money claim, even when such claim is associated with land, as in the case of a *benami* mortgage or of a *benami* lease, though it may be observed that even as regards leases [*Donzelle v. Kedarnath*(1), *Kedarnath v. Donzelle*(2), *Ind rbuttee v. Mahboob*(3), *Joynarayan v. Kadambini*(4), *Purnia v. Torab*(5), *Bogar v. Karam Singh*(6)], as also as regards mortgages [*Alijan v. Rambaran*(7) *Basiruddin v. Mahomed*(8)], there is apparently some divergence of judicial opinion. We accordingly hold that the plaintiff as *benamidar* is not entitled to maintain a suit for partition of the joint property in dispute.

It has finally been argued on the authority of the decision in *Ram Bhuroosee v. Bissesser*(9), that the

(1)(1871) 7 B. L. R. 720,

16 W. R. 186.

(2)(1873) 20 W. R. 352.

(3)(1875) 24 W. R. 44.

(4)(1871) 7 B. L. R. 723 note

(5)(1865) 3 Wyman's Rep. 14

(6)(1907) 2 P. W. R. 26

(7)(1910) 12 C. L. J. 357

(8)(1909) 12 C. W. N. 409.

(9)(1872) 18 W. R. 454.

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defendants should not have been allowed to object that the plaintiff was not the real owner. There is no foundation for this contention. The defendants allege that the vendor of the plaintiff was a party to a prior partition suit instituted in 1907 and that the present suit had been instituted at his instance and on his behalf by his *benamidar* with a view to enable him to escape from the effects of the decree in the earlier litigation. This, if established, is a complete answer to the suit as framed, and the defendants were undoubtedly competent to urge this defence as they have successfully done. This also meets another objection taken by the defendants, namely, that the proper procedure was not to dismiss the suit but to direct that the beneficial owner be made a joint plaintiff—a course commended in *Sita Nath v. Nobin Chunder*(1), *Gopi Nath v. Bhugwan Pershad*(2), *Kally Prosonno v. Dinonath*(3), *Bhola Pershad v. Ram Lall*(4). In the present case, the procedure now suggested cannot possibly be adopted. In the first place, the vendor of the plaintiff cannot be joined as a co-plaintiff without his consent. In the second place, if he was so joined, it would be of no avail, as the relief claimed must be refused on the ground that the suit is barred by the decree in the prior partition suit.

As a last resort, the plaintiff has relied upon her jote right, but we are of opinion that the District Judge has very properly left the matter open for adjudication in a separate suit appropriately framed in that behalf.

The result is, that the decree of the District Judge is affirmed and this appeal dismissed with costs.

S. K. B.

Appeal dismissed.

(1) (1879) 5 C. L. R. 102.

(3) (1873) 11 B. L. R. 56.

(2) (1884) I. L. R. 10 Calc. 697.

(4) (1896) I. L. R. 24 Calc. 34.

APPELLATE CIVIL.

Before Moorjree and Roe JJ.

SHERJAN KHAN

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ALIMUDDI.*

Principal and Agent—Liability of principal for fraudulent conduct of the agent—Scope of the agent's or servant's employment—Unauthorised acts—Tort—Scope of Agency.

The principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligence and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them. The principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit.

McGowan v. Dyer (1) *Hern v. Nichols* (2), *National Exchange Company v. Drew* (3), *Brocklesby v. Temperance P. B. Society* (4), *Pearson v. Dublin Corporation* (5), *Citizens Life Assurance Company v. Brown* (6), *Glasgow Corporation v. Lorimer* (7), *Bowles v. Stewart* (8), *Fitz Simons v. Duncan* (9), *Subjan Bibi v. Sariatulla* (10), *Morrison v. Verschoyle* (11), *Isicar Chunder v. Satish Chunder* (12), *Gopal Chandra v. Secretary of State* (13), *Motilal v.*

* Appeal from Appellate Decree, No 1468 of 1913, against the decree of Ramesh Chandra Sen, Subordinate Judge, Backergunj, dated Jan. 31, 1913, affirming the decree of Jadunath Majumdar, Munif of Barisal dated June 26, 1912.

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| (1) (1873) L. R. 8 Q. B. D. 141, 145. | (7) [1911] A. C. 299. |
| (2) (1708) 1 Salkeld 289. | (8) (1803) 1 Sch & Lef 209. |
| (3) (1885) 2 Macq. H. L. 103. | (9) (1905) 2 I. R. 483. |
| (4) [1895] A. C. 173. | (10) (1869) 3 B. L. R. 413. |
| (5) [1907] A. C. 851. | (11) (1901) 6 C. W. N. 429. |
| (6) [1904] A. C. 423. | (12) (1902) I. L. R. 30 Calc. 277. |
| | (13) (1909) I. L. R. 36 Calc. 647. |

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defendants should not have been allowed to object that the plaintiff was not the real owner. There is no foundation for this contention. The defendants allege that the vendor of the plaintiff was a party to a prior partition suit instituted in 1907 and that the present suit had been instituted at his instance and on his behalf by his *benamidar* with a view to enable him to escape from the effects of the decree in the earlier litigation. This, if established, is a complete answer to the suit as framed, and the defendants were undoubtedly competent to urge this defence as they have successfully done. This also meets another objection taken by the defendants, namely, that the proper procedure was not to dismiss the suit but to direct that the beneficial owner be made a joint plaintiff—a course commended in *Sita Nath v. Nobin Chunder*(1), *Gopi Nath v. Bhugnat Pershad*(2), *Kally Prosonno v. Dimonath*(3), *Bhola Pershad v. Ram Lall*(4). In the present case, the procedure now suggested cannot possibly be adopted. In the first place, the vendor of the plaintiff cannot be joined as a co-plaintiff without his consent. In the second place, if he was so joined, it would be of no avail, as the relief claimed must be refused on the ground that the suit is barred by the decree in the prior partition suit.

As a last resort, the plaintiff has relied upon her jote right, but we are of opinion that the District Judge has very properly left the matter open for adjudication in a separate suit appropriately framed in that behalf.

The result is, that the decree of the District Judge is affirmed and this appeal dismissed with costs.

S. K. B.

Appeal dismissed.

(1) (1879) 5 C. L. R. 102

(3) (1873) 11 B. L. R. 56.

(2) (1884) I. L. R. 10 Calc 697.

(4) (1896) I. L. R. 24 Calc 34.

APPELLATE CIVIL.*Before Mookerjee and Roe JJ.*

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ALIMUDDI.*

Principal and Agent—Liability of principal for fraudulent conduct of the agent—Scope of the agent's or servant's employment—Unauthorised acts—Tort—Scope of Agency.

The principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligence and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them. The principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit.

McGowan v. Dyer (1), *Hern v. Nichols* (2), *National Exchange Company v. Drew* (3), *Brocklesby v. Temperance P. B. Society* (4), *Pearson v. Julian Corporation* (5), *Citizens Life Assurance Company v. Brown* (6), *Glasgow Corporation v. Lorimer* (7), *Boules v. Steuart* (8), *Fitz Simons v. Duncan* (9), *Subjan Bibi v. Sariatulla* (10), *Morrison v. Verschoyle* (11), *Isucar Chunder v. Satis Chunder* (12), *Gopal Chandra v. Secretary of State* (13), *Motilal v.*

* Appeal from Appellate Decree, No 1408 of 1913, against the decree of Ramesh Chandra Sen, Subordinate Judge, Backergunj, dated Jan. 31, 1913, affirming the decree of Jadunath Majumdar, Munsif of Barisal dated June 25, 1912.

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| (1) (1873) L. R. 8 Q. B. D. 141, 145 | (7) [1911] A. C. 299 |
| (2) (1708) 1 Salkeld 289. | (8) (1803) 1 Sch. & Lef. 209. |
| (3) (1825) 2 Macq. H. L. 103 | (9) (1904) 2 I. R. 483 |
| (4) [1895] A. C. 173 | (10) (1869) 3 B. L. R. 413 |
| (5) [1907] A. C. 851 | (11) (1901) 6 C. W. N. 429. |
| (6) [1904] A. C. 423. | (12) (1902) I. L. R. 30 Calc. 2' 7. |
| (13) (1909) I. L. R. 36 Calc. 647. | |

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Gowiram (1), *British M. B. Co. v. Charnwood Forest Ry. Company* (2), *Mackay v. Commercial Bank* (3), *Suire v. Francis* (4), *Houldsworth v. City of Glasgow* (5) referred to.

Lloyd v. Grace (6) and *Rebent v. Great Fingall* (7) followed.

Burwick v. English Joint Stock Bank (8) and *Burma Trading Corporation v. Mirza Mahomed Ally* (9) explained.

Acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent even though he did not in fact authorise the commission of the fraudulent Act.

This rule of liability is based upon grounds of public policy. It seems more reasonable that where one of the two innocent persons must suffer from the wrongful act of a third person the principal who has employed and retained a dishonest agent and has placed him in a position of trust and confidence should suffer for his misdeed rather than a stranger.

SECOND APPEAL by Sherjan Khan and another, the defendants.

This appeal arises out of a decree for damages passed against the decree-holders for illegal attachment and sale of the cattle of the respondent, Alimuddi.

The facts are shortly these. Two persons, Sherjan Khan and Faizuddin, obtained a decree against four brothers—Jegerulla, Alimuddi, Salimuddi and Azmatulla. The decree was sought to be executed against Azmatullah alone by the attachment of his moveables. Warrant of attachment was ordered to be issued on the 4th July 1911 and on the 16th of July 1911, according to the allegation of both the parties, 3 heads of cattle were attached by the peon Asvini Kumar Das upon the identification of one Tomejuddi, Naib, with whom the judgment-debtors had been on terms of enmity and, indeed, and at a time when the judgment-

(1) (1905) I. L. R. 30 Bom. 83. (5) (1880) 5 A. C. 317.

(2) (1887) 18 Q. B. D. 714, 718. (6) [1912] A. C. 716.

(3) (1874) L. R. 5 P. C. 394. (7) [1906] A. C. 439, 465. *

(4) (1877) 3 A. C. 106. (8) (1867) L. R. 2 Ex. 259

(9) (1874) J. L. R. 4, Calc. 116.

debtors were away from home. The judgment-debtors maintained that the attached heads of cattle belonged to Alimuddi and were worth Rs. 210. The other party contended that the attached heads of cattle belonged to Azmatullah and were old and infirm and were suffering at the time from what is known as *khura* and were on that account sold at the low price of Rs. 13 only.

Hence the suit for damages for illegal attachment and sale of the cattle of the respondent Alimuddi.

The learned Munsif held that there was an abuse of process, and passed a decree for damages. On appeal by the defendants, the learned Subordinate Judge dismissed the appeal. Hence this Second Appeal.

Babu Abinash Chandra Guha, for the appellants.

Babu Asitaranian Chatterjee, for the respondent.

Cur. adv. vult.

MOOKERJEE J. This is an appeal by the defendants in an action for recovery of damages for illegal attachment and sale of movable property in execution of a decree for money. The facts found by the Courts below lie in a narrow compass. Two persons, who may be called X and Y, obtained a decree for money against four brothers A, B, C and D. The decree-holders applied for execution against D alone by attachment and sale of his movables. The warrant of attachment was issued in due course, but the peon, on the identification of P, the agent of the decree-holders, attached three heads of cattle which belonged to B. B protested and tendered the decretal amount, but the peon who was in collusion with P, had the cattle sold for an insignificant sum. It has been established that P acted in this manner on account of ill feeling which he bore towards the judgment-

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debtors. The judgment-debtors claimed damages from the decree-holders on account of illegal attachment and sale. The Courts below have concurrently decreed the suit. It cannot be disputed that the attachment was illegal; when execution had been taken out against D alone, the property of B could not be attached; besides, when the judgment-debtors offered to satisfy the decretal debt, their property could not be lawfully sold. It is obvious, consequently, that there was illegal attachment and sale of the movable property of the plaintiffs. The sole question in controversy is, whether the defendants are liable for the fraudulent conduct of their agent who, in collusion with the peon, has fraudulently brought about this result. The Courts below have answered this question in the affirmative. There can be no doubt that both upon principle and authority this view should be sustained.

It has not been disputed that under the law of England, a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. This is definitively laid down by the House of Lords in *Lloyd v. Grace* (1), which overrules the dicta to the contrary by Lord Bowen in *British M. B. Co. v. Charnwood Forest Railway Co.* (2) and by Lord Davey in *Rubens v. Great Fingall* (3). But it has been argued on behalf of the appellant that a contrary rule was enunciated in *Barwick v. English Joint Stock Bank* (4) and was adopted by the Judicial Committee in *Burma Trading Corporation v. Mirza Mahomed Ally* (5). There is no foundation, however, for this

(1) [1912] A. C. 716.

(3) [1906] A. C. 439, 465.

(2) (1887) 18 Q. B. D. 714, 718.

(4) (1867) L. R. 2 Ex. 259.

(5) (1878) I. L. R. 4 Calc. 116

contention. In the first place, as explained by the House of Lords in *Lloyd v. Grace* (1), the decision in *Barwick v. English Joint Stock Bank* (2) is not an authority for the proposition that a principal is not liable for the fraud of his agent, unless committed for the benefit of the principal. In the second place, it is extremely unlikely that Sir Montague Smith, who was a party to the decision in *Barwick v. English Joint Stock Bank* (2), should have misunderstood its effect and misapplied it in *Burma Trading Corporation v. Mirza Mahomed Ally* (3), the judgment wherein was pronounced with his concurrence by Sir Robert Collier. In the third place, the decision of the Judicial Committee was based on the ground that the acts of the alleged agent could not be treated as the wrongful acts of a servant or agent committed in the course of his service, for the plain reason that at the time it was not shown that he was a servant or an agent for the purpose of working in the forest on behalf of the company or of doing any class of acts analogous to those complained of. Consequently, no question could arise whether the liability of the principal depended on the circumstance whether the wrong had been committed by the servant for the benefit of the master. On the other hand, Sir Robert Collier quotes with approval the observation of Willes J.: "in all these cases it may be said that the master had not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." The true meaning and effect of the ruling of Willes J. in *Barwick*

(1) [1912] A. C. 716.

(2) (1867) L. R. 2 Ex 259

(3) (1878) I. L. R. 4 Calc. 116.

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v. *English Joint Stock Bank* (1) which was approved by the Judicial Committee in *Bombay-Burma Trading Corporation v. Mirza Mahomed Ally* (2), may also be ascertained from the opinion of the Judicial Committee in two other cases, *Mackay v. Commercial Bank* (3) and *Swire v. Francis* (4), the judgments wherein were delivered by Sir Montague Smith and Sir Robert Collier, respectively. Reference may further be made to the decision of the House of Lords in *Houldsworth v. City of Glasgow Bank* (5) where *Barwick v. English Joint Stock Bank, Ld.* (1), *Mackay v. Commercial Bank* (3) and *Swire v. Francis* (4) are examined and explained. Lord Selborne observes that the principle, on which those cases were decided was a principle, not of the law of torts or of fraud or deceit, but of the law of agency, and adds: "the decisions in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because, as it was well put by Mr. Justice Willes in *Barwick v. Joint Stock Bank* (1), with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." Lord Blackburn is equally explicit: "the substantial point decided was that an innocent principal was civilly responsible for the fraud of his authorised agent acting within his authority, to the same extent as if it was his own fraud." To the same effect is the exposition by Story in his classical work on Agency (sections 452, 456) where that distinguished lawyer states: "the principal is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other

(1) (1867) L. R. 2 Ex. 259.

(3) (1874) L. R. 5 P. C. 394. -

(2) (1878) I. L. R. 4 Calc. 116.

(4) (1877) L. R. 3 A. C. 106.

(5) (1880) L. R. 5 A. C. 317.

malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorise or justify or participate in, or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them." The learned author adds: "the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done or he has subsequently adopted them for his own use and benefit." This statement of the law was accepted by Blackburn J. in *McGowan v. Dyer* (1) and had been foreshadowed nearly two centuries earlier when Holt C.J. held in *Hern v. Nichols* (2), that a merchant was accountable for the deceit of his factors though not criminaliter, yet civiliter, "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." This position is well illustrated by the decisions in *National Exchange Company v. Drew* (3), *Brocklesby v. Temperance P. H. Society* (4), *Petroleum v. Dublin Corporation* (5), *Citizens' Life Assurance Co. v. Brown* (6), *Glasgow Corporation v. Torture* (7), *Bowles v. Stewart* (8) and *FitzSimons v. Dunn* (9). It may be observed that the rule as formulated by Story is in accord with a long line of authorities in the Courts of the United States, where an instructive attempt has been repeatedly made to justify the doctrine on principle. Thus, in *Higgins v. Watervliet* (10) Mr. Justice Andrews observed:—"Every person is bound to use due

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(1) (1873) L. R. 8 Q. B. 141, 145

(6) [1904] A. C. 423

(2) (1709) 1 Salkeld 289

(7) [1911] A. C. 209

(3) (1885) 2 Macq., H. L. 103.

(8) (1803) 1 Sch. and Lef. 209.

(4) [1895] A. C. 173.

(9) (1908) 2 I. R. 433.

(5) [1907] A. C. 351

(10) (1871) 46 N. Y. 24.

7 Am. Rep. 293.

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care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. The omission of such care by the latter is the omission by the principal, and for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents, it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondeat superior* applies, provided only that the agent was acting at the time for the principal and within the scope of the business." Again, in *Jackson v. American Telephone Co.*(1) Mr. Justice Walker observed:—"Whoever commits a wrong is liable for it, and it is immaterial whether it is done by him in person or by another acting by his authority, express or implied. *Qui facit per alium, facit per se.* Upon this maxim of the law is founded the doctrine that the principal is liable for the tort of his agent, and the master for the tort of his servant. If the wrongful act is done by express command of the master, or even if he has afterwards made it his own by adoption, there is no difficulty in applying the rule; but it is otherwise when the liability must proceed only from an implied authority. Where the servant does a wrong to a third person, the rule of *respondeat superior* applies, and the master must answer for the tort if it was committed in the course and scope of the servant's employment and in furtherance of the master's business." In *Alger v. Anderson* (2), the Court observed that the doctrine broadly stated is rested upon the ground "that the principal having held the agent out as having authority and having clothed him with power to act in a particular

(1) (1905) 139 N. C. 347;

(2) (1897) 78 Fed. 729, 735.

51 S. E. 1017; 70 L. R. A. 738.

matter, as between two innocent persons, should suffer as having given occasion for the loss." The truth is that this rule of liability is based upon grounds of public policy; it seems more reasonable that where one of two innocent persons must suffer from the wrongful act of a third person, the principal who has employed and retained a dishonest agent and has placed him in a position of trust and confidence should suffer for his misdeeds rather than a stranger: *Philadelphia Railway Co. v. Derby* (1), *Washington Gas Light Co. v. Lansden* (2), *MacIntire v. Pryor* (3) *Foster v. Essex Bank* (4), *Reynolds v. Witte* (5) *Andrews v. Solomon*, (6), *Milburn v. Wilson* (7).

Reference may also be made to the decisions in *Subjan v. Sariatulla* (8), *Morrison v. Verschoyle* (9), *Iswar Chunder v. Satish Chunder* (10), *Gopal Chandra v. Secretary of State* (11) and *Motilal v. Govindram* (12). These cases recognise the doctrine that acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule whereby the principal is held liable for the torts of his agent, even though he did not in fact authorise the commission of the fraudulent act. There are, no doubt, *dicta* in some of these cases, based apparently upon a misapprehension of the rule enunciated by Willes J. in *Barwick v. English Joint Stock Bank* (13), and particularly of the expression "for the master's benefit." The true meaning and scope of the rule, however, has now

- (1) (1852) 14 Howard 480.
- (2) (1898) 172 U. S. 534.
- (3) (1898) 173 U. S. 38.
- (4) (1821) 17 Mass. 508 ;
9 Am. Dec. 68.
- (5) (1879) 13 S. C. 5 ;
36 1 M. Rep. 678.
- (6) (1816) Peter. C. C. 360 ;
1 Fed Cas. 378

- (7) (1901) 31 C. n. Sup. Court 481.
- (8) (1869) 3 B. L. R. 413.
- (9) (1901) 6 C. W. N. 429.
- (10) (1902) I. L. R. 30 Calc. 207.
- (11) (1909) I. L. R. 36 Calc. 647.
- (12) (1905) I. L. R. 30 Bom. 83, 87.
- (13) (1867) L. R. 2 Ex. Ch. 259

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been settled beyond controversy by the decision of the House of Lords in *Lloyd v. Grace* (1). The principle expounded there is based, as we have seen, on 'justice equity and good conscience', and no conceivable reason has been suggested, why it should be held inapplicable to this country.

The result is that the decree of the Subordinate Judge is affirmed, and this appeal dismissed with costs.

ROT J. Negligence and malice, mistake and fraud are so closely allied that they are often not to be distinguished. It could never be, and never was, a good defence to an action upon a tort done by a servant or by an agent, to plead that the tort was done, not by accident but on purpose.

My learned brother has so fully traced to its source and exposed the fallacy that to render the master liable, the act of the servant must be for the master's benefit, that there remains nothing for me to add. The sole test is the scope of the agent's authority. In the case before us, the act done by the agent was clearly within the scope of his authority.

I agree that the principal is liable, and that the appeal be dismissed with costs.

S. K. B.

Appeal dismissed.

(1) [1912] A. C. 716.

PRIVY COUNCIL.

MUSAHAR SAHU

P.C.^o
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v.

LALA HAKIM LAL.

Nov 8, 9, 22

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Transfer of Property Act (IV of 1882) s. 53—Debtor and Creditor—Suit to set aside deed as being void as delaying or defeating creditors—Deed made on good consideration—Preference by debtor to one creditor rather than another where debtor retains no benefit for himself.

In this appeal their Lordships of the Judicial Committee upheld the decision of the High Court, which is reported in I. L. R. 34 Calc. 999, at page 1003.

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors for the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor, and leave another unpaid.

In re Moroney (1) and Middleton v. Pollock (2) followed.

When it was found that the transfer impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it followed that no ground for impeaching it lay in the fact that the plaintiff (appellant), who also was a creditor, was a loser by payment being made to the preferred creditor—there being in the case no question of bankruptcy.

APPEAL 10 of 1912 from a judgment and decree (3rd April 1907) of the High Court at Calcutta which reversed a judgment and decree (30th July 1901) of the Court of the Subordinate Judge of Mozufferpur.

The plaintiffs were appellants to His Majesty in Council.

* Present: VISCOUNT Haldane, LORD PARROD, LORD WENFURY, SIR JOHN EDGE, AND MR. AMEER ALI.

(1) (1887) L. R. 21 Ir. 27.

(2) (1876) L. R. 2 Ch. D. 104, 108

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LAJ.

The main questions for determination on this appeal were (*a*) whether the sale and conveyance of certain properties to the respondents by the defendant Kishun Bonode Upadhyaya (a judgment-debtor of the appellants) by a deed of 2nd September 1901, was liable to be set aside as being a fictitious transaction executed in fraud of the appellants; (*b*) whether a suit could be maintained to set aside the deed as being in fraud of creditors under section 53 of the Transfer of Property Act (IV of 1882); and (*c*) whether the conveyance was void or voidable under section 53 of that Act.

The facts are sufficiently set out in the report of the case in the High Court (MOOKERJEE and HOLMWOOD JJ.) which will be found in I. L. R. 34 Calc. 999.

On this appeal,

B. Dube, for the appellants, contended that the conveyance to the respondent, Hakim Lal, dated 2nd September 1901 was part of a fraudulent and collusive conspiracy to which the respondents were parties. The two *kobalas* executed on that date were parts of one transaction, and if one of them, as had been held by both the Courts below, was fictitious and not made for good consideration, the other one, as being part of the same transaction, must be void also. It was executed in bad faith with the intention of delaying and defeating the creditors. The fact that the deed was made for good consideration did not make it valid, if it was not *bona fide*, but made for the purpose of defeating the appellant's claim: *Cadogan v. Kennett* (1) Merely giving a good consideration was not conclusive evidence of good faith; and the onus was on the respondents of showing that the deed was made *bona fide*. That was not proved, and the deed was, it

was submitted, liable to be set aside under section 53 of the Transfer of Property Act (IV of 1882). [VIS-COUNT HALDANE referred to the case of *Middleton v. Pollock* (1). Here the debtor has not retained any benefit for himself. Giving priority or preference to one creditor rather than another is immaterial.]

A. M. Dunne, for the respondents, was not called upon.

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MUSAHARSAHUv.LALA HAKIMLAL

The judgment of their Lordships was delivered by

LORD WRENBURY. On the 2nd September 1901 Kishun Benode executed two *kobalas* or conveyances, the one to Kamta Prashad and the other to Hakim Lal. They were conveyances of certain lands, the parcels in the second deed being much more numerous than those in the first deed. Kamta Prashad was the nephew of Ram Aotar Lal, a brother of Hakim Lal. He was a minor and Ram Aotar Lal was his guardian.

The plaintiff, Musahar Sahu, was at this date a creditor of Kishun Benode. He had on the 11th December 1900 sued for the debt and on the 5th January 1901 had presented a petition for security by way of attachment before judgment. On the 11th February 1901, Kishun Benode had made an affidavit that he did not intend to transfer any of his properties, and accordingly on the 11th February 1901 the petition was dismissed.

In this state of facts the two *kobalas* were executed by the debtor on the 2nd September 1901.

On the 5th December 1901 the plaintiff obtained judgment in his action for Rs. 12,695-10 and costs. The defendant did not appear at the trial. On the 21st December 1901, Kishun Benode applied for a re-hearing, but on the 2nd August 1902 that application

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was dismissed by default. In the interval, viz., on the 11th June 1902, the transferees had obtained an order for registration of their names in respect of the properties transferred.

Under these circumstances two suits were brought to set aside the *kobalas* on the ground that within section 53 of the Transfer of Property Act IV of 1832, the transfers were made with intent to defeat or delay the creditors of Kishun Benode.

The Subordinate Judge set aside the first *kobala* on the ground that no consideration was paid, that a debt of Rs. 6,335 therein alleged to be due to Kamta Prashad was fictitious, that the transfer was made gratuitously, and that the transfer was made with intent to defraud. An appeal was dismissed with costs, and this decision is not questioned before this Board.

As regards the second *kobala*, there are concurrent findings that the consideration for this deed was real and not fictitious. The Subordinate Judge nevertheless decided in favour of the plaintiff. Upon appeal this decision was reversed, and the second *kobala* upheld. From that decision the plaintiff has brought this appeal.

The appellant has not argued that the law is wrongly laid down in the judgment of the High Court. His contention is that the two deeds of the 2nd September 1901 form really one transaction, and that the second *kobala* must fall with the first.

As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles, C. B., in

Re Moroney (1) where he says :—

"The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. It follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the statute, because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid: *Middleton v. Pollock* (2). So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy.

The argument presented to their Lordships has in substance been that the transaction of the 2nd September 1901 was one transaction: that (i) Kamta Prashad, the nephew, the minor and ward, and (ii) Hakim Lal, the uncle of Kamta and brother of Ram Aotar Lal, the minor's guardian, are for the purpose not distinguishable as independent transferees, that from the 11th February 1901 until after the 11th June 1902 Kishun Benode was praying for time, and that this fact and the fact that the former *kobala* was

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fictitious and fraudulent show that the latter *kobala* was fraudulent also. Their Lordships do not accept this contention. The *kobala* in favour of Hakim Lal must stand or fall on its own merits. The concurrent finding that the consideration for the deed was real reduces the case to one in which the debtor has preferred one creditor to the detriment of another, but this in itself is no ground for impeaching it under the section even if the debtor was intending to defeat an anticipated execution by the plaintiff.

Their Lordships will humbly advise His Majesty that the appeal should stand dismissed with costs.

Appeal dismissed.

Solicitors for the appellants ; *T. L. Wilson & Co.*
Solicitors for the respondents ; *Watkins & Hunter.*

J. V. W.

PRIVY COUNCIL.

BANK OF BENGAL

^a P.C.
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Nov 16, 17
Dec. 16.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMAH AT RANGOON.]

Principal and Agent—Construction of Power of Attorney—Denial of authority of agent—Chetty money-lending firm, business of—Power implied from nature of business which could not be carried on without it—Proof of similar previous transactions with objection by principal—Account books, presumption to be drawn from—Evidence Act (I of 1872) s. 114.

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behalf of his firm. The client, after drawing large sums of money on the cash credit account thus opened, having become insolvent, the Bank brought an action for the amount due, to which the defence was a denial of authority on the part of the agent to enter into the transaction so as to bind the defendant's firm.

Held (reversing the decision of an Appellate Bench of the Chief Court), that applying the principles of construction of powers of attorney laid down in *Bryant, Poeris and Bryant v. La Banque du Peuple* (1) the authority to enter into transactions of the nature in dispute in the present case, was to be found in the document itself by necessary implication from the nature of the business with the general management of which the agent was entrusted: without such authority it would hardly have been possible to carry on the business of a money-lender and financier.

On the evidence, moreover, it was proved that amongst such Chetty money-lending firms it was the practice for the agent to pledge the credit of the firm; and that for a considerable time similar transactions had been entered into previously by the agent without his authority being questioned. The mere fact that the defendant did not receive any benefit on the transaction would not (if it were the case) relieve him of liability, if the authority of the agent was established; but the defendant's books of account which were called for and not produced, would presumably have shown such transactions, and the receipt of commission on them.

APPEAL 42 of 1915 from a judgment and decree (26th March 1914) of the Chief Court of Lower Burma in its appellate jurisdiction, which reversed a judgment and decree (16th and 30th August 1912) of the same Court in its Original Civil jurisdiction.

The plaintiffs were the appellants to His Majesty in Council.

The suit which gave rise to this appeal was brought by the Bank of Bengal against L. Lutchmanan Chetty to recover the balance of the cash credit account and interest due to the Bank from one Hashim Ebrahim, a borrower from the Bank, for which balance the Bank alleged that L. Lutchmanan Chetty was liable as a surety.

L. Lutchmanan Chetty carried on the business of banker and money-lender in Rangoon, but resided at Devokata in the Presidency of Madras, and at the material time the business was conducted in Rangoon by one Chockalingam Chetty his agent appointed by power of attorney. The guarantee to the Bank in respect of the account of Hashim Ebrahim was signed by Chockalingam Chetty as agent.

The question to be determined on this appeal was whether L. Lutchmanan Chetty was bound by the act of his agent in giving such guarantee.

L. Lutchmanan Chetty died pending the suit, and his representatives were substituted as defendants (now respondents).

The Trial Judge (ROBINSON J.) found that the guaranteeing of other persons' accounts was a common practice amongst Chetties in Rangoon, but held that Chockalingam Chetty had no authority under his power of attorney to guarantee the cash credit account of Hashim Ebrahim, on the ground that it had not been proved that L. Lutchmanan Chetty was "interested or concerned" in the transaction. He held further that there was no evidence that L. Lutchmanan Chetty had ever expressly forbidden his agent to enter into such guarantees, and that it had been proved that the Bank had received no notice of any such prohibition; that L. Lutchmanan Chetty had held out his agent as having authority to give guarantees, and had ratified and confirmed the guarantee sued, and that there was consideration. Accordingly by his decree the Trial Judge ordered the defendants to pay to the plaintiff Bank the sum of Rs. 63,122-12-5 with further interest and costs.

The defendants appealed and ORMOND and PARLETT JJ., who heard the appeal, affirmed the finding of the Trial Judge that the agent had no authority under the

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power of attorney to enter into the guarantee, on the grounds that the power of attorney did not expressly empower him to guarantee debts, and that as the guaranteeing of debts was not a necessary incident in the carrying on of a Chetty banking and money-lending business, such a power could not be implied from the fact that he was appointed for the purpose of carrying on such a business. The judgment reversed the findings of the Court below that the agent had been held out as having authority to guarantee debts, and that the transaction in question had been ratified by L. Lutchmann Chetty.

The Chief Court therefore allowed the appeal and dismissed the suit with costs in both Courts.

The following was the judgment of the Chief Court on appeal delivered by ORMOND J. (PARLETT J. concurring.)

"The plaintiff Bank sues the defendant firm for the sum of Rs. 50,000 with interest in the following circumstances:—On the 3rd May 1908 one Hashim Ebrahim had a cash credit account with the plaintiff Bank, and in order to secure the same, upon the request of the plaintiff Bank, executed a promissory note for Rs. 50,000 and interest in accordance with the practice of the Bank, in favour of the defendant firm. The agent of the defendant firm endorsed the said promissory note over to the Bank, and at the same time executed an agreement guaranteeing the payment of the said cash credit account. The defence is a denial of the authority of the agent to enter into the contract of guarantee. It is proved that the defendant's agent entered into 23 transactions with the Bank as surety for others between 1904 and May 1908, 6½ of which were guarantees of persons other than Chetties. On 21st July 1908 the defendant's agent guaranteed this man Hashim Ebrahim; and on 3rd November 1908 the defendant's agent was guaranteed by Hashim and the firm of S. R. M. The learned Judge on the Original Side in his judgment says:—“Now having regard to the approved practice, and to the ordinary presumptions that must arise as to the ordinary course of business and human affairs, it is impossible to hold that these agents (defendant's agents) had never submitted accounts to their principal; that he should have remained in ignorance of the fact that they were not only carrying on this branch of Chetty banking business on his behalf. The agent was guaranteeing other

persons loans, and no exception was taken by the principal to his conduct on his behalf for years, and in my opinion it must be therefore held that he held his agent out as having the power to guarantee the accounts, and further that the power in so guaranteeing was ratified and confirmed by him. . . . Notice was given him (defendant) to produce his account books, but they had not been produced. These account books would have shown these transactions. They would have shown the receipt of commission which would be consideration. Further, the agreement itself sets out a consideration. It is at the request of the defendant's agent that the cash credit account is given and that imports a consideration.

"The Judge therefore gave the plaintiff a decree. The defendant was the sole proprietor of that firm and is dead. The question of ratification was first raised by the plaintiff when the case came on for hearing. The books were not produced before, because the only question was:—had the agent authority to enter into this transaction? The learned Judge has assumed that commission was charged for this transaction; that these transactions must have been entered in the books and that the agent sent the books to his principal; and therefore that the principal knew of these transactions of guarantee. In order to make the defendant liable upon a ratification, the plaintiff must show that the defendant had full knowledge of the facts. There is no question whether there was consideration to support a contract of suretyship as between the Bank and the defendant. Mr. Giles, who appeared for the plaintiff respondent, admits that the question is not really one of ratification, but whether the authority to enter into the transaction of guarantee must necessarily be implied from the powers conferred in the power of attorney. The power of attorney is in the form generally used amongst Chetties. It recites the desire of the principal to appoint the agent his attorney for the general management of his banking and money-lending business. It then constitutes the agent the lawful attorney to transact, conduct, and manage all and every or any of the affairs, concerns, matters and things, in which the principal then was or thereafter might be in anywise interested and concerned and for that purpose to use or sign the principal's name on any documents whatsoever. To borrow money from Banks, firms or persons, either with or without a pledge of securities for money advanced to various persons, to make, draw, sign, accept, endorse, negotiate and transfer bills of exchange pro-notes etc. to which the principal's signature or endorsement might be required or which the attorney might in his absolute discretion think fit, in the name of the principal. The agent therefore had a general authority to carry on the business of a Chetty banker and money-lender on behalf of his principal as the sole proprietor of the business and an express power to borrow money and to endorse promissory notes for the purposes of that

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"The Bank have called two Chetties in support of the proposition that it is a necessary incident in a Chetty's money lending business, to guarantee the debts of others. Ramanath Chetty, the 2nd witness for the plaintiff, the agent for the R. M. M. S. T. firm says that his firm has not guaranteed overdrafts of accounts of persons other than Chetties. He has heard that some Chetties do guarantee; in such cases the Chetty gets a commission. In cross-examination he states that 'those whose principals allowed them to guarantee the overdrafts of other people they guarantee.' His own

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On this appeal,

Sir H. Erle Richards, K. C., and F. J. Coltman, for the appellant, contended that the Chief Court had wrongly held that the respondents were not liable on the contract of guarantee. The power of attorney, if not expressly then by implication, authorised Chockalingam Chetty to endorse the promissory note, and execute the guarantee agreement. Reference was made to *Bryant, Powis and Bryant v La Banque du Peuple* (1). If the respondents had produced the account books, which were called for, they would have shown that guaranteeing loans and overdrafts fell within the scope of Lutchmanan Chetty's business of banker and money-lender; and in the absence of the account books,

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Rangoon, which he carried on by agents, under name and style of "Ana Roona Laina," or shortly "A. R. L. Chetty." Previous to 1901 he had two partners, but after the death of one and the retirement of the other in that year, he was the sole owner of the business.

By a power of attorney dated the 21th of October 1901, he appointed one Ramaswamy Chetty, described in the document as "at present of Rangoon," as his attorney under "the style or firm of Ana Roona Laina or A. R. L. Ramaswamy Chetty." On the 15th of May 1905 Ramaswamy, by the power reserved to him in his appointment, substituted in his place one Chockalingam Chetty "as the attorney and agent" of the defendant. And since his appointment Chockalingam admittedly has managed the entire money-lending business of the defendant's firm in Rangoon.

The transaction which forms the basis of the present claim was entered into in May 1908. It appears that about this time one Hassum (or Hashim) Ebrahim, with whom Chockalingam had previous dealings and who was evidently a constituent of the firm, applied to him for financial assistance. He acceded to the request, and the arrangement that was come to between them was in substance this, that Chockalingam should pledge the firm's credit with the plaintiff bank to enable Ebrahim to have a cash credit account opened in his name and obtain from the bank advances not exceeding in the aggregate Rs. 50,000, and that to secure the due repayment of this amount with interest thereon he should execute a promissory note in favour of the defendant's firm which Chockalingam on his side should endorse over to the bank.

It is to be observed in this connection that under the provisions of The Presidency Banks Act (XI of 1876, s. 37, cl. e), the bank is precluded from opening

cash credits on the security of any negotiable instrument of :—

"any individual or partnership firm . . . which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership."

It was in view of this provision of the law and the practice of the bank in conformity therewith, that the promissory note for Rs. 50,000, bearing the usual bank rate of interest, was executed on the 23rd May 1908, by Ebrahim in favour of "A. R. L. Chockalingam Chetty," the name under which the defendant's firm admittedly carried on business in Rangoon. This note was endorsed over by Chockalingam to the bank. Thus both Ebrahim and the Chetty firm became severally liable on the note, one as the drawer, the other as the endorser, for advances to Ebrahim on his cash credit account.

At the same time and on the same date Chockalingam gave to the plaintiff bank a letter of guarantee on behalf of his firm. It stated the nature of the transaction and the character of the obligation undertaken by the Chetty firm in these terms :—

"In consideration of the Bank of Bengal having agreed at our request to grant to Hassum Ebrahim (who is hereinafter referred to as the Borrower) accommodation by way of Cash Credit to such an amount from time to time as the Bank in its discretion shall think proper upon condition that such Cash Credit shall to the extent of Rs. 50,000 and interest be secured by the Promissory Note hereinafter mentioned we the undersigned A. R. L. Chockalingam Chetty (Guarantor) have delivered to the Bank of Bengal a Promissory Note dated 23rd May 1908 for Rs. 50,000 and interest payable on demand made by the said Borrower in favour of us and endorsed by us to the said Bank or order (the said Promissory note being intended as a guarantee to the extent of Rs. 50,000 and interest of the balance from time to time due to the said Bank from the said Borrower on account of the said Cash Credit) on the understanding that the Bank shall be at liberty to take steps to enforce payment of the said Promissory Note at any time after notice in writing demanding payment thereof posted to us at our usual or last known address and default being made in payment for three days after the posting of such notice."

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Ebrahim appears to have drawn considerable sums of money on the cash credit account thus opened. He was adjudicated an insolvent shortly after, and his assets vested in the Official Assignee. He himself is said to have absconded.

The plaintiff bank thereupon called upon the defendant to pay the amount due from Ebrahim, and on his failure to do so, brought the present action in the Chief Court of Lower Burmah in its original civil jurisdiction. The defence to the action in the main is the denial of authority on the part of Chockalingam to enter into the transaction so as to bind the defendant's firm..

The case was at first heard *ex parte*, owing to the default of the defendant to enter appearance, but the *ex parte* decree was set aside, and the suit came on for trial as a contentious cause on the 17th January 1912, before Ormond J., who framed the issues and took part of the evidence. It was heard subsequently by Robinson J. The defendant, besides putting in the power of attorney and the instrument substituting Chockalingam in place of Ramaswamy, adduced no evidence; and Robinson J. held in substance that although there was no express authority to the agent to enter into a transaction of this nature the defendant subsequently ratified and confirmed the act, and was therefore clearly liable. He accordingly decreed the plaintiffs' claim. The Appellate Court did not agree with this view. The learned Judges further considered that if guaranteeing the loans of others was to be regarded as "necessary incident of the business, it would not be so much a money lending business as an insurance business."

They accordingly dismissed the suit.

In their Lordships' opinion this judgment cannot be supported. The learned Judges seem to have

missed the real point at issue. They do not appear to have correctly apprehended the character and extent of the powers entrusted to the agent or the nature of the business which he conducted and managed on behalf of the defendant in Rangoon.

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Their Lordships desire to refer shortly to the principal provisions of the power directly bearing on the question raised in the case. After setting out that he was formerly carrying on the business of "bankers and money-lenders in Rangoon" in co-partnership with two other persons, and that owing to the death of one partner and the retirement of the other, he was then "solely carrying on the same business" under the style of A. R. L. Chetty, and that he was desirous of appointing RamaSwamy Chetty as his attorney for the general management of his said business, the defendant (Lutchmanan Chetty) proceeds to state the duties with which he charges the agent and the powers he entrusts him with:—

"To transact, conduct, and manage all and every or any of the affairs, concerns, matters, and things in which I, the said I. A. R. L. Lutchmanan Chetty, now am or hereafter may be in anywise interested and concerned, and for that purpose to use or sign my name to all and every or any documents or document writings or writing whatsoever. To borrow money from bank or banks, firm or firms, person or persons, either with or without pledge of securities money advanced to various persons."

The authority to borrow is given in explicit and the broadest terms, "either with or without pledge of the securities" lodged with the agent by constituents for moneys advanced to them.

The power then goes on to declare:—

"To make, draw, sign, accept, endorse, negotiate and transfer all and every or any Bills of Exchange, Promissory Notes, Hundis, Cheques, Drafts, Bills of Lading and all and every other negotiable securities whatsoever to which my signature or endorsement may be required or which my said attorney may in his absolute discretion think fit, to make, draw, sign, accept, endorse, negotiate and transfer in my name and on my behalf."

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It is to be borne in mind that the defendant's business was a general money-lending business, in the course of which he financed both Chetties and non-Chetties. The agent had express authority to borrow. For what purpose? To lend to others. It was an essential incident of the business; and the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents. It was a matter of convenience that, instead of receiving the money directly himself and lending it to the borrower, he authorised the lender, in this case the bank, on the pledge of the firm's credit, to advance the money to the borrower.

Applying to the power in the present case the canon of construction laid down in *Bryant, Powis and Bryant, Ld. v. La Banque du Peuple*(1) viz.—“that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication,” their Lordships consider that the authority to enter into transactions of the nature in dispute is to be found in the document itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted. Without such authority it would hardly have been possible to carry on the business of a money-lender and financier.

It is clear from the facts proved in the case that for three years it was accepted, and business was transacted on the basis, that the agent was invested with full authority in that behalf. For between May

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1905 and May 1908 Chockalingam entered into twenty-three identical transactions without, so far as appears on the record, any question being raised that they were in excess of his authority. Besides, there is evidence that among these Chetty, money-lending firms it is the practice for the agent to pledge the credit of the principal in this manner.

It was urged on behalf of the defendant that it was not shown he had received any benefit from the transaction in question. Their Lordships think that if authority is established the mere fact that the principal did not receive any benefit does not rid him of his liability. But it is to be observed that the case of the plaintiff bank was that the defendant's books of accounts would show receipt of commission on the transaction. It called upon the defendant to produce those books, which he failed to do; nor was Chockalingam called to support his allegation in respect of the non-receipt of commission.

Their Lordships are of opinion that the decree of the Chief Court should be set aside, and that of Robinson J. should be restored. The respondents must pay the costs of this appeal and of the appeal in the Chief Court.

And their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the appellant: *Arnould & Son.*

Solicitors for the respondents: *Bramall & White.*

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ORIGINAL CRIMINAL.*Before Sanderson C.J.*

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Perjury—Power of High Court to direct prosecution when false evidence given before the Committing Magistrate in the mofussil—Nearest first class Magistrate—Presidency Magistrate—Criminal Procedure Code (Act V of 1898), s. 476—Practice.

Where a witness examined during the trial of a prisoner at the Original Criminal Sessions of the High Court has intentionally made false statements before the committing officer at B in the district of Alipore, the High Court has jurisdiction, under s. 476 of the Criminal Procedure Code, to send the case of the witness for inquiry or trial to the District Magistrate of Alipore as the nearest Magistrate of the first class.

Kedar Nath Kar v. King-Emperor (1), *Emperor v. Tripura Shankar Sarkar* (2) distinguished.

ONE David Donaldson, a European British subject, was employed as an assistant in the Anglo-India Jute Mill at Jagatdal, in the Barrackpore subdivision, under an agreement which expired in January 1916. In June or July 1915 he made the acquaintance of a Mrs. J. S. Drummond in Chandernagore, and an intimacy sprung up between them. She was in the habit of visiting him in his rooms at the mill till the matter attracted the attention of J. M. Graham, the manager of the mill. On the morning of the 5th of November Graham spoke to Donaldson of his relations with the woman, and informed him that, unless he severed his connection with her, his agreement would not be renewed.

* Original Criminal Jurisdiction.

(1) (1905) 3 C. L. J. 257.

(2) (1910) I. L. R. 37 Calc. 618.

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himself in the bed-room whilst she was in his sitting room. He further deposed that the portions of his statements to the Committing Magistrate, set out above in italics, were false to his knowledge. Mrs. Drummond was ultimately found not guilty by the jury, on the 10th March in the proportion of 7 to 2, and their verdict was accepted by the learned Chief Justice who discharged the prisoner.

On Monday, the 12th instant, an application was made for sanction to prosecute Donaldson for giving false evidence under s. 193 of the Penal Code.

The Standing Counsel (Mr. B. C. Mitter) (instructed by Mr. J. T. Hume, Public Prosecutor). I apply for sanction under s. 195 (1) (b) of the Criminal Procedure Code, on behalf of the Legal Remembrancer, to prosecute Donaldson for perjury on contradictory statements, one of which must be false, following the procedure in *Emperor v. Tripura Shankar Sarkar* (1). One of the statements was made to the Committing Magistrate at Barrackpore and the other before this Court, and a question might arise as to the Court which ought to grant sanction. If the statement in the Magistrate's Court is false, sanction might be given by that Court or the High Court.

[SANDERSON C. J. referred to s. 476 of the Criminal Procedure Code.]

Section 476 would not apply having regard to the case of *Kedar Nath Kar v. King-Emperor* (2). Refers to *Aiyakannu Pillai v. Emperor* (3) and *In re An Attorney* (4). If the case was sent to the District Magistrate of Alipore, the accused might take an objection to his jurisdiction, and if any difficulty arose, an

(1) (1910) I. L. R. 37 Calc. 618. (3) (1908) I. L. R. 32 Mad. 49, 57.

(2) (1905) 3 C. L. J. 357.

(4) (1913) I. L. R. 41 Calc. 446.

application might be made to the Court at which the offence was committed.

SANDERSON C.J. I think this case is different in regards to the facts, from the cases which have been drawn to my attention. This is a case where the committal of the accused person, Mrs. Drummond, was by the Committing Magistrate sitting at Barrackpore within the district of Alipore and the case was committed to the sessions of the High Court. The case was tried by me sitting at the sessions, and the accused on Friday last was acquitted. During the course of the trial one of the witnesses, Mr. Donaldson, went back on the statements which he had made before the Committing Magistrate, and which were of a material character. When he was examined by the learned Standing Counsel, he admitted that several of the statements which he had made on oath to the Committing Magistrate were false to his knowledge. This matter was mentioned to me at the conclusion of the case, and was adjourned until this morning.

An application is now made before me on behalf of the Crown for sanction under section 195 of the Criminal Procedure Code to prosecute Mr. Donaldson for perjury. I think, however, the proper course to take is to send the case for inquiry to the nearest Magistrate of the first class, under section 176, and inasmuch as the case comes from the district of Alipore, and I am informed that the nearest Magistrate of the first class is in that district, it seems to me the natural thing is to send the case to him.

It does not seem to me that I am prevented from taking this course by the decisions which have been drawn to my attention, viz., *Kedar Nath Ray v. King-Emperor* (1) and *Emperor v. Tripura Shankar*

1916 *Surkar* (1), because the facts of those cases were not the same as in this case.

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For these reasons, the order I make is that I am of opinion that there is ground for inquiring into an offence referred to in section 195 of the Criminal Procedure Code, namely, an offence punishable under section 193 of the Indian Penal Code, which was brought under my notice in the course of the trial of Mrs. Drummond, and having made such preliminary inquiry as may be necessary, I send the case against Mr. Donaldson for inquiry or trial, as the case may be, to the nearest Magistrate of the first class. I will not send Mr. Donaldson in custody. I require him to give security for his appearance before such Magistrate to the satisfaction of the officer of this Court. He will have to appear before the Magistrate to-morrow, and if he be not then ready to proceed, he will no doubt be afforded ample opportunity by the Magistrate to instruct a solicitor, or otherwise prepare for his defence.

I adjourn the application so far as section 195 of the Code of Criminal Procedure is concerned, and give liberty to apply, if necessary.

E. H. M.

(1) (1916) I. L. R. 37 Calc. 618

APPELLATE CIVIL.

Before Mookerjee and Beachcroft J.J.

BIRENDRA KISHORE MANIKYA

v.

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July 13.

KALITARA DEBL.*

Bengal Tenancy Act (VIII of 1885) s. 102—Its amendment in 1905—Effect of s. 102—Settlement Officer, power of.

Section 102 of the Bengal Tenancy Act has now been amended by the insertion of a new clause which expressly authorises the Settlement Officer to decide when the land is claimed to be held rent-free—whether or not rent is actually paid, and if not paid, whether or not the occupant is entitled to hold the land without payment of rent, and if so entitled under what authority. The very circumstance that the Legislature has inserted this clause in section 102 points to the conclusion that the matter provided for thereunder is not covered by the other clauses of section 102.

The Legislature could not possibly have intended to accord finally to a decision of a dispute by a Settlement Officer which it was beyond the jurisdiction of the Revenue Officer to decide under section 106 of the Bengal Tenancy Act.

Radha Kishore v. Durganath (1), *Donay Dass v. Keshab Prakas* (2), *Nabin Chandra v. Radha Kishore* (3), *Nikunja Behary v. Radha Kishore* (4), *Secretary of State for India v. Nitye Singh* (5), *Dharani Kanta Lahiri v. Gaber Ali Khan* (6), *Karmi Khan v. Brojo Nath Das* (7) and *Birendra v. Bhoutah* (8) referred to.

SECOND APPEAL by Maharaja Birendra Kishore Manikya, the plaintiff.

* Appeal from Appellate Decree No. 172 of 1911, against the decree of A. H. Committee, District Judge of Tippera dated Nov. 29, 1910 varying the decree of Pandit Moton Chatterjee, Munsif of Tippera, dated Nov. 29, 1909.

(1) (1911) I L R 32 C S 162	(2) (1911) I L R 32 C S 22
(2) (1911) 2 C W N 70	(3) (1911) I L R 32 C S 23
(3) (1911) 11 C W N 259	(7) (1911) I L R 32 C S 24
(4) (1911) 22 C I J 112	(8) (1911) 22 C I J 113

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This appeal arises out of a suit instituted by the plaintiff for declaration of title to the land in suit and for declaration that the defendant held the same under the plaintiff on a jama of Rs. 33-4 or, in the alternative, for an assessment of rent and for arrears of rent. The defendant contended that they held the land under a rent-free grant and pleaded limitation. The learned Munsif decreed the suit but, on appeal, the lower Appellate Court dismissed the suit. Hence this second appeal by the plaintiff.

Babu Birendra Chandra Das (with him *Babu Dwarka Nath Chuckerbutty*), for the appellant, contended that in a proceeding under Chapter X of the Bengal Tenancy Act the Settlement Officer assessed Rs. 33-4 as fair and equitable rent of the land. This decision in favour of the plaintiff was made on the 17th of April 1898. The learned vakil contended that the decision of the Settlement Officer was final and operated as *res judicata*, and relied upon section 9 of Act III of 1898. He further submitted that the Settlement Officer had jurisdiction to decide the question whether the land was rent-free or not: *Nabin Chandra v. Radha Kishore* (1), *Donay Dass v. Keshub Pruthi* (2). *Secretary of State for India v. Nitye Singh* (3), *Radhu Kishore v. Durganath* (4). *Babu Bipin Chandra Bose*, for the respondent, was not called upon.

MOOKERJEE AND BEACHCROFT JJ. This is an appeal by the plaintiff in a suit for assessment of rent of land, which, the defendants contend, they hold under a rent-free title. The Court of first instance found in favour of the plaintiff and decreed the suit.

(1) (1907) 11 C. W. N. 859.

(3) (1893) I. L. R. 21 Calc. 38.

(2) (1904) 8 C. W. N. 741.

(4) (1904) I. L. R. 32 Calc. 162.

Upon appeal, the District Judge has reversed that decision, and, has held, *first*, that the decision of the question by the Settlement Officer does not conclude the matter in controversy; and, *secondly*, that from the long and uninterrupted possession of the defendants without payment of rent to the plaintiff or his predecessor, the inference may legitimately be drawn that the original grant was rent-free. On the present appeal, the validity of the conclusion of the District Judge upon the second aspect of the case has not been disputed, but it has been argued that the decision of the Settlement Officer, which was adverse to the defendants, operates as *res judicata*, and that it was not open to the District Judge to come to an independent determination on the merits.

From an examination of the record, it transpires that on the 17th April 1897, the Settlement Officer decided, in the course of a proceeding under Chapter X of the Bengal Tenancy Act, that the present defendants had failed to establish before him their alleged rent-free title. On the basis of this decision of the dispute between the parties, the rent was subsequently settled and the record was finally published on the 1st December 1898. The appellant now contends, with reference to sub-section I of section 9 of Beng. Act III of 1898, which came into force on the 2nd November 1898, that the decision of the Revenue Officer, though prior in point of time, was embodied in a Record of Rights published afterwards and precludes an investigation of the matter by the Civil Court.

Sub-section (I) of section 9 is in these terms: "Every settlement of rent or decision of a dispute by a Revenue-officer under section 101 or section 103 of the Bengal Tenancy Act, 1885, before the commencement of this Act, in respect of which no appeal has, before the commencement of this Act, been preferred

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to the Special Judge appointed under section 108 of that Act, shall have the force and effect of a decree of a Civil Court in a suit between the parties, and shall be final." The appellant argues that there was a decision of a dispute by a Revenue Officer under section 106 of the Bengal Tenancy Act, 1885, and that such decision has the force and effect of a decree of a Civil Court in a suit between the parties and is final. This contention is based upon a superficial view of the provisions of sub-section (1) of section 9. It was ruled by this Court in the case of *Radha Kishore v. Durganath* (1) that the words "every settlement of rent or decision of a dispute by a Revenue Officer" in section 9 are applicable only to those cases which a Revenue Officer has jurisdiction to try and are not applicable to a decision of a Settlement Officer as to the validity of a lakhiraj title under section 104 of the Bengal Tenancy Act, 1885. This conclusion coincides with the decision in *Donay Dass v. Keshub Pruthi* (2), where Mr. Justice Ghose observed that the Legislature could not possibly have intended to accord finality to a decision of a dispute by a Settlement Officer which it was beyond the jurisdiction of the Revenue Officer to decide under section 106. This view is, in our opinion, eminently reasonable. Reliance, however, has been placed upon the later decision in *Nabin Chandra v. Radha Kishore* (3) where the attention of the Court was not drawn to the cases of *Donay Dass v. Keshub Pruthi* (2) and *Radha Kishore v. Durganath* (1). There is a dictum in this judgment to the effect that the doctrine of *res judicata* applies, irrespective of the question whether the decision of the Revenue Officer was or was not competent under section 104 or 106. In

(1) (1904) I. L. R. 32 Calc. 162. (2) (1904) 8 C. W. N. 741.

(3) (1907) 11 C. W. N. 859

support of this view, reliance was placed upon the decision in *Nikunja Behary v. Radha Kishore* (1). On an examination of the judgment in that case, however, it transpires that the decision is not an authority for the proposition deduced therefrom. There it was held that the particular decision of the Revenue Officer was within his jurisdiction; and if the decision was within his competence, it was plainly final between the parties under sub-section (1) of section 9 of Act III of 1898. We may further observe, with reference to the decision in *Nabin Chandra v. Radha Kishore* (2), that although reliance was placed upon the doctrine of *res judicata*, the court yet proceeded to determine the case on the merits and came to the conclusion that the claimants had failed to establish their alleged rent-free title on the basis of the *sanaiks* and the other documents produced by them. We hold accordingly that the appellant can succeed, only if the decision of the Settlement Officer dated the 17th April 1897 was a decision of a dispute, which he was competent to decide under section 106 of the Bengal Tenancy Act as it stood before its amendment in 1898.

It cannot, we think, be seriously maintained that the Settlement Officer was competent to decide a question of this character before the amendment of the statute in 1898. This is plainly indicated by the fact that section 102 has now been amended by the insertion of a new clause which expressly authorises the Settlement Officer to decide, when the land is claimed to be held rent-free, whether or not rent is actually paid, and if not paid, whether or not the occupant is entitled to hold the land without payment of rent, and if so entitled, under what authority. The very circumstance that the Legislature has

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inserted this clause in section 102 points to the conclusion that the matter provided for thereunder is not covered by the other clauses of section 102. This, in fact, was the view taken by a Full Bench of this Court in the case of *Secretary of State for India v. Nitye Singh* (1) and is also in accord with the decision in *Dharani Kant Lahiri v. Gaber Ali Khan* (2). But it has been argued that the decision of the Full Bench should be limited to cases where the Settlement Officer is invited to decide whether an alleged rent-free grant constitutes a valid title, and in support of this our attention has been drawn to isolated passages in the judgments delivered by the Full Bench. But we prefer to accept the interpretation of the decision of the Full Bench as given by Mr. Justice Prinsep who delivered the leading judgment in that case; his view will be found in the case of *Radha Kishore v. Durganath* (3), and was confirmed on appeal by a Bench of three Judges. Reference has also been made to the case of *Karmi Khan v. Brojo Nath Das* (4), but that decision, rightly interpreted, does not support the contention of the appellant. In fact, the question whether a lakhiraj is valid or not, does not and cannot require consideration in a case of this description; the proceeding is not by the Government for assessment of revenue on land alleged to be held revenue free, but is by the proprietor of an estate for assessment of rent on land claimed by the occupier to be held as rent-free. It has finally been urged that if this view be taken, it would be open to any occupier of land to defeat the proceeding before the Settlement Officer by an unfounded assertion that the land was held rent-free. There is no ground for this apprehension, for as was pointed out by Mr. Justice Prinsep in *Nikunja*

(1) (1893) I. L. R. 21 Calc. 38. (3) (1904) I. L. R. 32 Calc. 162.

(2) (1902) I. L. R. 30 Calc. 539. (4) (1894) I. L. R. 22 Calc. 244, 248.

Behler v. Radha Kishore (1) it is open to the Settlement Officer to investigate whether rent has, as a matter of fact, been paid in respect of the disputed land; if it is proved that rent has been paid, the Settlement Officer is competent to assess fair and equitable rent on the land; if, on the other hand, it is proved that rent has never been paid in respect of the land, he cannot assess rent thereon merely because he is of opinion that the alleged rent-free title has not been proved. This was the law under the Bengal Tenancy Act as it stood before its amendment in 1898. The law, however, was altered in 1898 and the controversy cannot be raised again. We hold accordingly that the decision of the Settlement Officer dated the 17th April 1897 does not operate as *res judicata*, and that it was open to the District Judge to come to a determination of the matter in dispute on the evidence before him. That determination, as we have said, is not, and cannot be successfully assailed on the merits, as it accords with a long line of cases in this Court: *Birendra v. Bhoirab* (2).

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

S. K. B.

(1) (1903) 22 C. L. J. 148

Appeal dismissed

(2) (1913) 29 C. L. J. 295

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APPELLATE CIVIL.

Before Moskerjee and Beachcroft JJ.

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July 22.

SURENDRA NARAIN ROY CHOWDHURY

v.

DINA NATH BOSE.*

Rent, suit for—Title Paramount, dispossession by—Onus of proof—Apportionment of rent—Evidence Act (I of 1872) s. 102.

Where a tenant is sued for rent, he can set up eviction by title paramount to that of his lessor as an answer; and if evicted from part of the land, an apportionment of the rent may take place; but the onus is on the lessor to show what is the fair rent of the lands out of which the tenant was not evicted.

Gopanund Jha v. Lalla Gobinl Prosad (1) referred to.

SECOND APPEAL by Surendra Narain Ray Chowdhury, the plaintiff.

This appeal arose out of a suit for recovery of arrears of rent at the rate of Rs. 27 with cess and damages due from 1316 B. S. down to *kist* Pous of 1319 B. S. in respect of an *osat taluk* held by defendants under taluk Pran Narain Roy. The defendant No. 1 appeared and in his written statement denied the relationship of landlord and tenant with the plaintiff, and pleaded that the suit was barred under sections 15, 16 and 188 of the Bengal Tenancy Act, and that the cess and damages were excessively claimed.

* Appeal from Appellate Decree, No. 1449 of 1914, against the decree of Ramesh Chandra Sen, Subordinate Judge of Backergunge, dated March 29, 1914, reversing the decree of Surendra Nath Sen, Munsif of Perozepur, dated July 11, 1913.

He further pleaded that Babu Kiran Chandra Roy and others, having purchased the 13 gandas zemandari of Kasiswari Choudhurani, brought a suit for *khās* possession against the plaintiff, defendants and others, and obtained decree for some land of the disputed *osat taluk*, and that consequently the plaintiff could not obtain decree without re-adjustment of the *jama*.

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The learned Munsif decreed the suit with costs. The defendant appealed to the Subordinate Judge who, reversing the decision of the Munsif, decreed the appeal. Thereupon the plaintiff appealed to the High Court.

Dr. Dwarka Nath Mitra and *Babu Baikuntha Nath Mitra*, for the appellant.

No one for the respondent.

MOOKERJEE AND BEACHCROFT JJ. This is an appeal by the plaintiff in a suit for arrears of rent. The plaintiff claimed rent at the rate of Rs. 27 a year. The defendants contended that they had been dispossessed of a portion of the tenancy by title paramount and that the plaintiff was consequently not entitled to the entire rent claimed. The Court of first instance found that the defendants had not been dispossessed of any lands of their tenancy by title paramount and decreed the claim in full. Upon appeal, the Subordinate Judge has found that the defendants have been deprived of a portion of the lands of their tenancy by title paramount and that they are entitled to an abatement of rent. He has, however, dismissed the suit, as there is no evidence to show what rent is payable to the plaintiff in respect of the lands still in the occupation of the tenants. On the present appeal, it has been argued that the burden of proof was upon the defendants to show, to what extent they are

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entitled to abatement of rent. In our opinion, there is no foundation for this contention.

It was pointed out by Sir Barnes Peacock C. J. in the case of *Gopanund Jha v. Lalla Gobind Prosad* (1), that where a tenant is sued for rent, he can set up eviction by title paramount to that of his lessor as an answer, and if evicted from part of the land, an apportionment of the rent may take place; but the onus is on the lessor to show what is the fair rent of the lands out of which the tenant was not evicted. This view is plainly well-founded on principle, because, as stated in section 102 of the Evidence Act, the burden of proof lies on that person who would fail if no evidence at all were given on either side. The defendants asserted that they had been dispossessed of a portion of the land of the tenancy by title paramount. The burden lay upon them to establish the truth of this allegation. They have discharged that burden; consequently, it is plain that the plaintiff cannot recover rent at the rate of Rs. 27 a year. If the contention of the plaintiff were well-founded, that the burden lay upon the defendants to prove the extent of abatement, it would be incumbent upon the Court, if no evidence were given on either side, to award the plaintiff a decree at the full rate claimed, although the Court was satisfied that he was not entitled thereto. It is thus unquestionable that the burden lay upon the plaintiff to establish what rent he was entitled to recover from the tenants in respect of the lands now in their occupation. This he has entirely failed to do; he directed all his energy to prove that there had been no dispossession of the tenants by title paramount, and did not adduce evidence to show what would be fair rent for the lands in their occupation. As a last resort, the plaintiff has prayed that

the case may be remitted to the Court of first instance in order that the question of apportionment of rent may be determined in this litigation. We are of opinion that we should not accede to this request. The burden, as we have said, lay upon the plaintiff to establish his case. He has failed to discharge that burden, because he came into Court with an untrue allegation that the defendants were still in occupation of all the lands of their tenancy and did not adduce direct evidence to show what rent was fairly payable in respect of the lands actually in their possession. Such evidence, indeed, could not be adduced by the plaintiff because that would have been destructive of his case that the defendants were in occupation of all the lands of their tenancy. The plaintiff cannot now be permitted to take the case back to the Court of first instance and to have the question of fair rent tried. It will be open, however, to the plaintiff in any future litigation to claim re-adjustment of rent.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed.

S. K. B.

Appeal dismissed.

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Bef re Jenkins C. J., N. R. Chatterjea and Mullick J.s.

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ABDUL RAHMAN CHOWDHURI

Aug. 10.

*v.***AHMADAR RAHMAN.***

Incumbrance—Absolute sale—Unregistered purchaser of portion of patni tenure, interest of, whether an incumbrance—Bengal Tenancy Act (VIII of 1885) ss. 161, 167—Civil Procedure Code (Act V of 1905) s. 98.

Per JENKINS C. J. and N. R. CHATTERJEE J. (MULLICK J. dissenting). The interest of an unregistered purchaser of a portion of a patni tenure is not an "incumbrance" within the meaning of s. 161 of the Bengal Tenancy Act.

Chundra Sakai v. Kalli Prosanno Chuckerbutty (1) distinguished.

A purchaser of a tenure at a sale held in execution of a rent decree is not therefore required to annul such an interest (*i.e.* of an unregistered purchaser of a portion of a patni) under the provisions of s. 167 in order to get a clear title.

SECOND APPEAL by Abdul Rahman Chowdhuri, the plaintiff.

The plaintiff sued for recovery of possession from the unregistered purchaser of a portion of a patni tenure alleging he had purchased the whole tenure at a sale held in execution of a rent decree. The Court of Appeal below having reversed the decision of the Court of first instance, which was in plaintiff's favour, the latter appealed to the High Court. At the

* Appeal from Appellate Decree, No. 2462 of 1910, against the decree of W. S. Coutts, District Judge, of Chittagong, dated April 29, 1910, confirming the decree of Akhoy Kumar Chakravarti, Additional Munsif of Fatikchari, dated May 27, 1909.

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hearing of this second appeal, there being a difference of opinion between N. R. Chatterjea and Mullick JJ., with reference to the question whether the interest of an unregistered purchaser of a portion of a patni tenure was an "incumbrance" within the meaning of section 161 of the Bengal Tenancy Act, the point of law, which was referred to a third Judge under the provisions of section 98 of the Code of Civil Procedure, was heard by Jenkins C. J., on the 30th July 1915.

The judgments of the dissentient Judges were as follow :—

N. R. CHATTERJEA J. The plaintiff appellant purchased a *patni taluk* at a sale held in execution of a decree for arrears of rent, and sued to recover possession of the lands in suit which were included in the taluk from the defendants who were in possession thereof by purchase from the former patnidar. The Courts below dismissed the suit on the ground that the purchases made by the defendants of portions of the patni were "incumbrances" within the meaning of section 161 of the Bengal Tenancy Act, which had not been annulled according to the provisions of section 167 of that Act. The plaintiff has appealed to this Court.

Before dealing with the above question, I will notice a point raised on behalf of the respondents, viz. that the landlord was bound to recognise the transfers of portions of a permanent tenure, and the transferees not having been made parties to the rent suit, the sale held in execution of the decree in the rent suit passed only the interest of the person who was a party to the decree. But the tenure in the present case is a patni tenure, and, under the Patni Regulation transfers of fractional portions of a patni taluk are not binding upon the zemindar, although the transferee acquires a *taluk title to the portion purchased*. This is clear from sections 5 and 6 of the Regulation and if any authority were needed, I may refer to the decision of the Judicial Committee in *Walsam v. Collector of Rishibakshy* (1). The cases relied upon on behalf of the respondent do not support his contention. In *Sourentra Mohan Tagore v. Sernomoyi* (2) it was held that although the transferee of a fractional share of a patni cannot enforce registration of his name on payment of the necessary fee and tender of the requisite security, yet the transfer is not altogether void and

(1) (1869) 12 W. R. & P. C. 43.

(2) (1892) I L. R. 26 Cal. 103

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he is liable for rent severally and jointly with the registered tenant if the landlord chooses to recognise him as one of the joint-holders of the patni, and he is also liable for the entire rent of the patni estate. The other case *Aosub Ali Pramanik v. Bisshuri* (1) also is to the same effect. These cases are no authorities for the proposition that the transfer of a share in a patni without the express consent of the zamindar is binding upon him. They only lay down that the transferee is liable jointly with the registered patnidar if the landlord chooses to recognise him as one of the joint-holders of the patni. In the present case, the zamindar did not recognise the transferee, and he was not bound to do so. This contention must therefore be overruled.

The zamindar sued the registered patnidar for rent, and in execution of the decree for rent brought the tenure to sale, and the plaintiff purchased it with power to annul all incumbrances. The defendants were unregistered transferees of the patni, and the question is whether their interests were incumbrances within the meaning of section 161 of the Bengal Tenancy Act.

Now the defendants being transferees of portions of the patni, their position was that of co-sharers of the former patnidar, though not recognised by the landlord. The sale held in execution of the decree for arrears of rent against the recorded patnidar passed the tenure itself, and not merely the right, title and interest of the recorded patnidar. The recorded patnidar represented the ownership of the patni, and so far as the patni itself was concerned, the sale passed the interest of the transferees of portions of the patni, as much as it did that of the recorded patnidar.

Section 161 of the Bengal Tenancy Act lays down that, for the purposes of Chapter XIV of that Act, the term "incumbrance", used with reference to a tenancy, "means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding, or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section (section 160)." Now the right or interest created by the sale of a portion of the tenure itself is not a right or interest created by the tenant on the tenure, nor, do I think, is it a right or interest "in limitation of his own interest therein." The words "his own interest therein" in the case of a tenure mean the interest of a tenure-holder; and the right or interest created must be in limitation of such interest, and not a transfer of the tenure-holder's interest itself. By a sale of a portion of the tenure, the interest of the tenant in the tenure itself to the extent of the portion sold is transferred, and not an interest

created in limitation of his own interest in the tenure. It is said that when a tenant transfers a part of his tenure, he does so in limitation of his interest, meaning thereby his entire interest, in it. But the words—in limitation of his own interest therein—would seem to indicate that it is not limitation in respect of the quantity or extent of interest which is contemplated and which could have been sufficiently expressed by saying "his interest therein", but has reference to limitation in respect of the particular interest held by the tenant.

The purchaser of a portion of the tenure professes to purchase and does purchase the ownership of the tenure itself to the extent of the portion purchased, and becomes a co-sharer of the original tenant. He is as much bound by the decree for rent as his vendor. He can maintain a suit for his share of the surplus proceeds of the sale held in execution of a decree for rent against the recorded tenant [see *Matangini Chaudhurani v. Sreenath Das* (1)]. It is true a mortgagee can also do so, but a mortgagee can do so only as an incumbrance and to the extent of his lien, whereas the purchaser of a portion of the tenure has a right as a tenure-holder to the surplus sale proceeds representing the portion purchased by him, because the sale is of the tenure including the portion purchased by him.

I think therefore that the words "in limitation of his own interest therein" do not refer to a sale of the tenure-holder's interest. As pointed out in *Tamiruddin Khan v. Khoda Nawaz Khan* (2), the right created by a sale of a portion of the tenure itself is to that extent not in "limitation", but in "extinction" of the rights of the tenure-holder. If the sale of a portion of a tenure is an incumbrance, the sale of the whole tenure would also be an incumbrance, and the purchaser at a sale for arrears of rent would get nothing unless he takes steps within a year from the date of the sale to annul the interest of the private purchaser under section 167 of the Bengal Tenancy Act. I do not think such a result was contemplated by the section.

I may in this connection refer to certain observations of Mookerjee, J., in *Biswani Koer v. Mathura Prasad* (3) (at pages 20-21), where one of the questions to be considered was whether the interest of a person who has acquired by purchase the rights of the owner constitutes an "incumbrance" within the meaning of section 54 of Act XI of 1859. The learned Judge observed "It was not disputed, and in my opinion it could not be reasonably disputed that, if a person acquires the interest of the original owner of the estate before the default is made, his interest cannot be said to be an incumbrance and passes by the sale to the purchaser because what is sold

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(1) (1903) 7 C. W. N. 552 (2) (1909) 14 C. W. N. 229

(3) (1907) 7 C. L. J. 1, 20, 21.

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he is liable for rent severally and jointly with the registered tenant, if the landlord chooses to recognise him as one of the joint-holders of the patni, and he is also liable for the entire rent of the patni estate. The other case *Aosub Ali Pramanik v. Hisseshuri* (1) also is to the same effect. These cases are no authorities for the proposition that the transfer of a share in a patni without the express consent of the zemindar is binding upon him. They only lay down that the transferee is liable jointly with the registered patnidar, if the landlord chooses to recognise him as one of the joint-holders of the patni. In the present case, the zemindar did not recognise the transferees and he was not bound to do so. This contention must therefore be overruled.

The zemindar sued the registered patnidar for rent, and in execution of the decree for rent brought the tenure to sale, and the plaintiff purchased it with power to annul all incumbrances. The defendants were unregistered transferees of the patni, and the question is whether their interests were incumbrances within the meaning of section 161 of the Bengal Tenancy Act.

Now the defendants being transferees of portions of the patni, their position was that of co-sharers of the former patnidar, though not recognised by the landlord. The sale held in execution of the decree for arrears of rent against the recorded patnidar passed the tenure itself, and not merely the right, title and interest of the recorded patnidar. The recorded patnidar represented the ownership of the patni, and so far as the patni itself was concerned, the sale passed the interest of the transferees of portions of the patni, as much as it did that of the recorded patnidar.

Section 161 of the Bengal Tenancy Act lays down that, for the purposes of Chapter XIV of that Act, the term "incumbrance", used with reference to a tenancy, "means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding, or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section (section 160)." Now the right or interest created by the sale of a portion of the tenure itself is not a right or interest created by the tenant on the tenure, nor, do I think, is it a right or interest "in limitation of his own interest therein." The words "his own interest therein" in the case of a tenure mean the interest of a tenure-holder; and the right or interest created must be in limitation of such interest, and not a transfer of the tenure-holder's interest itself. By a sale of a portion of the tenure, the interest of the tenant in the tenure itself to the extent of the portion sold is transferred, and not an interest

created in limitation of his own interest in the tenure. It is said that when a tenant transfers a part of his tenure, he does so in limitation of his interest, meaning thereby his entire interest, in it. But the words—in limitation of his own interest therein—would seem to indicate that it is not limitation in respect of the quantity or extent of interest which is contemplated and which could have been sufficiently expressed by saying "his interest therein", but has reference to limitation in respect of the particular interest held by the tenant.

The purchaser of a portion of the tenure professes to purchase and does purchase the ownership of the tenure itself to the extent of the portion purchased, and becomes a co-sharer of the original tenant. He is as much bound by the decree for rent as his vendor. He can maintain a suit for his share of the surplus proceeds of the sale held in execution of a decree for rent against the recorded tenant [see *Matangini Chaudhurani v. Sreenath Das* (1)]. It is true a mortgagee can also do so, but a mortgagee can do so only as an incumbrancer and to the extent of his lien, whereas the purchaser of a portion of the tenure has a right as a tenure-holder to the surplus sale proceeds representing the portion purchased by him, because the sale is of the tenure including the portion purchased by him.

I think therefore that the words "in limitation of his own interest therein" do not refer to a sale of the tenure-holder's interest. As pointed out in *Tamizuddin Khan v. Khoda Nasar Khan* (2), the right created by a sale of a portion of the tenure itself is to that extent not in "limitation", but in "extinction" of the rights of the tenure-holder. If the sale of a portion of a tenure is an incumbrance, the sale of the whole tenure would also be an incumbrance, and the purchaser at a sale for arrears of rent would get nothing unless he takes steps within a year from the date of the sale to annul the interest of the private purchaser under section 167 of the Bengal Tenancy Act. I do not think such a result was contemplated by the section.

I may in this connection refer to certain observations of Mookerjee, J., in *Bhawani Koer v. Mathura Prasad* (3) (at pages 20-21), where one of the questions to be considered was whether the interest of a person who has acquired by purchase the rights of the owner constitutes an "incumbrance" within the meaning of section 54 of Act XI of 1859. The learned Judge observed "It was not disputed, and in my opinion it could not be reasonably disputed that, if a person acquires the interest of the original owner of the estate before the default is made, his interest cannot be said to be an incumbrance and passes by the sale to the purchaser because what is not

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(1) (1903) 7 C. W. N. 552

(2) (1909) 16 C. W. N. 229

(3) (1907) 7 C. L. J. 1, 20, 21

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is in essence his share in the estate" and again "a purchaser of the interest of the proprietor after default and before the revenue sale is quite as much bound by the revenue sale as the proprietor himself, because in substance he occupies the position of the proprietor." The observations were no doubt made in connection with the provisions of section 54 of the Revenue Sale Law, which does not contain a definition of the word "incumbrance," and I have referred to them only to show that the purchaser of the interest of the proprietor stands in the same position as the proprietor himself in relation to the sale.

We were referred to several cases, but none of them holds that a purchase of the tenure-holder's interest is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. In the case of *Chundra Salai v. Kalli Prosanno Chuckerbutty* (1) it was held by Norris and Gorlon, JJ., that an exchange of land is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act. Gorlon, J., in delivering the judgment of the Court observed, "it seems to us that the exchange by which this land was acquired by the defendants was in limitation, if not in fact, in destruction of the original tenant's right in the holding."

The case of an exchange may perhaps be distinguished from that of a sale, although the two stand on the same footing generally, so far as the rights of the parties are concerned. A person who takes the land of a tenure by exchange does not take it as a part of the tenure nor as a tenant. The tenant does not create an interest in the *tenure itself* as in the case of a sale, and in that view it may possibly be said that he creates an interest in "limitation" of his own interest in the tenure.

But if there is no distinction between an "exchange" and a "sale" so far as the present question is concerned, the view that an "exchange" is in "limitation" of the tenant's interest is opposed to that taken in *Tamizuddin Khan v. Khoda Nawaz Khan* (2), and if an exchange is in "destruction" of the tenant's right, it cannot be an "incumbrance" within the meaning of section 161 of the Bengal Tenancy Act. I have doubts about the correctness of the decision in the case of *Chundra Salai* (1) referred to above, and in any case, I think, it ought not to be extended further. In *Jogeshwar Majumdar v. Abed Mahomed Sirkar* (3), there is an observation that a "lease just as much as a sale, gift or mortgage must come within the word "incumbrance". In that case the learned Judges had only to deal with the question whether a "lease" is an "incumbrance" within the meaning of section 11 clause 3 of the Patni Regulation. It is true that, under that Regulation, sales and gifts, as well as mortgages

(1) (1895) I L. R. 23 Cale. 254. (2) (1909) 14 C. W. N. 229.

(3) (1896) 3 C. W. N. 13.

and leases are treated as "incumbrances". But the word "incumbrance" appears to have been used in that Regulation in a different sense, as it includes a sale of the entire patni itself. Besides, the purchaser, under section 15 of that Regulation, is entitled, on applying to the Civil Court, to obtain possession against the assignees of the defaulting patnidar at the time of delivery of possession.

The mode of enforcement of rights of the purchaser of a patni taluk as against assignees of the defaulting patnidar under the Patni Regulation is different from that of a purchaser under the Bengal Tenancy Act, and the question we have to consider in the present case is whether the interest of the purchaser of a portion of a tenure is an encumbrance within the meaning of section 161 of the Bengal Tenancy Act, which, if not set aside under section 167 of the Act, stands good against the purchaser.

The other cases referred to in argument are *Tamizuddin Khan v. Khoda Naeaz Khan* (1) and *Akbar Ali v. Gopi Mohon Roy Choudhury* (2). Both the cases dealt with the meaning of the word "incumbrance" in section 86 of the Bengal Tenancy Act. In the first, it was held that the sale of a portion of a non-transferable occupancy holding is not an encumbrance within the meaning of section 86, sub-sections 6 and 7 of the Bengal Tenancy Act, and the case of *Jogeshwar Marundar v. Abed Mahomed Sarkar* (3) was distinguished. In the second, which was decided by Mookerjee, J., and one of the members of the present Bench, it was held that the surrender by the tenant of his holding to his landlord in that case after he had transferred a portion of his holding was collusive, and that so long as the tenancy of the original tenant subsisted, the landlord was not entitled to evict the transferee. Another question was raised in the case, viz., whether the purchaser of a portion of a holding is not protected under sub-section 6 of section 86 of the Bengal Tenancy Act, but in the view that was taken of the rights of the parties with reference to the first question, the Court held that it was not necessary to decide whether the case of *Tamizuddin Khan v. Khoda Naeaz Khan* (1) upon which reliance was placed on behalf of the respondent furnished a correct exposition of the law. The Court, however, observed that at least four points required consideration with reference to the decision in *Tamizuddin Khan v. Khoda Naeaz Khan* (1). The last two points referred to by the Court have no bearing upon the construction of section 161 of the Bengal Tenancy Act. With regard to the first two points it was observed—"In the first place, the learned Judges adopted for the purposes of the interpretation of section 86, which finds a place in Chapter

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IX of the Bengal Tenancy Act, the definition of the term "incumbrance" given for the purposes of Chapter XIV alone. In the second place, the decision of this Court in the case of *Chundra Sakai v. Kalli Prosanna Chuckerbutty* (1) shows that an exchange is an encumbrance within the meaning of section 161 of the Bengal Tenancy Act, and in relation to the question raised before us, there does not appear to be any real distinction between an exchange and a sale." Now, the Court in that case expressly said that it was not necessary to determine whether the case of *Tamizuddin Khan v. Khola Nawaz Khan* (2) was correctly decided, and reserved its opinion upon the question involved in the said case. But the observation on the first point indicates if anything, that, in the view of the Court, the term "incumbrance" as used in section 161 is not the same as in section 86, and the observation on the second point, viz., that "there does not appear to be any real distinction between an exchange and a sale" was made in relation to the question before the Court, i.e., in connection with section 86 of the Bengal Tenancy Act. The Court in that case had nothing to do with the construction of the term "incumbrance" in section 161 of the Bengal Tenancy Act, and these cases under section 86 therefore do not apply to the present case.

It is pointed out that adverse possession for the statutory period has been held to be an "incumbrance." In the case of adverse possession however, although the tenant, by allowing the adverse possessor to acquire a right, may be said to create an interest in limitation of his interest in the tenure, no right is created in favour of such a person, as a tenant, as in the case of a sale, and the latter does not hold the portion in respect of which he acquires a statutory title, as a tenant or as part of the tenure. The purchaser of a portion of the tenure on the other hand acquires a right to a portion of the tenure itself, and holds such portion as a tenant and as a part of the tenure, and his position therefore differs materially from that of a person who has acquired a statutory title against the tenant.

I am of opinion that the interest of an unregistered purchaser of a portion of a patni tenure is not an incumbrance within the meaning of section 161 of the Bengal Tenancy Act, and that the purchaser at a sale held in execution of a rent decree against the recorded patniwar is not required to annul such an interest under the provisions of section 167 of the Bengal Tenancy Act.

In my opinion, therefore, the decrees of the lower Court should be set aside and the suit decreed.

MULLICK J. The defendant is the purchaser of a share in a patni taluk from the registered tenant and the question is whether his interest

(1) (1895) I. L. R. 23 Calc. 254

(2) (1909) 14 C. W. N. 229.

is an incumbrance on the tenure within the meaning of section 161 of the Bengal Tenancy Act. If the interest is not an incumbrance, then the auction purchaser who is the zamindar is entitled to take possession without annulling the defendant's interest. In the present case admittedly the procedure for annulment of incumbrances has not been taken within the statutory period of one year from the date of the sale or from the date on which the purchaser had notice of the incumbrance and the decree-holder's suit for khas possession must fail unless he can show that the interest in question is not an incumbrance.

Now an incumbrance, as defined in section 161, being any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein and not being a protected interest as defined in the last foregoing section, it seems to me clear that the interest of a purchaser of a share of a tenure from one of the registered tenants must fall within this definition and if the meaning of the statute is plain, it is not our province to speculate as to the intentions of its framers. A tenant by selling a portion of his tenure creates a right or interest on his tenure as well as an interest in limitation of his own interest in the tenure. The extinction of his interest in that portion of the tenure which is transferred does not affect the matter. The sole question is whether the definition applies. This would appear to have been the view taken by this Court in *Chandra Salar v. Kalli Prosanno Chuckerbutty* (1). In that case the plaintiff was the auction purchaser of a raiyati holding at a rent sale brought about by the patnidar and sued to eject the defendants from three plots of land in the holding which the defendants claimed to have obtained from the recorded tenant in exchange for some other lands outside the holding. It was held that the interest of the defendants was an incumbrance within the meaning of section 161. The learned Judges observed in that case that the defendants had an incumbrance upon the holding and the exchange by which the land was acquired by the defendants was in limitation, if not, in destruction of the original tenant's right in the holding. Although other statutes do not always furnish a safe guide, yet in the present case it would be useful to examine the previous law upon the subject of annulment of incumbrances in respect of tenancies. The first statute which gave the auction purchaser of a tenure sold for arrears of rent the power to avoid incumbrances was Regulation VIII of 1819. The term incumbrance is not defined in that regulation, but it is clear from the text that it covers transfers by sale, mortgage or gift. A complete extinction of the tenant's interest is therefore under the Regulation not inconsistent with the

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creation of an incumbrance. But Regulation VIII of 1819 only applied to a limited class of saleable tenures and, although section 105 of Act X of 1859 rendered all other saleable tenures also liable to sale for arrears of rent, there was no proceeding for bringing the latter to sale free of incumbrances. This difficulty was removed by Act VIII (B.C.) of 1865. In that Act also there is no definition of the term incumbrance, but the reported cases show that a sale by the registered tenant of a portion of his tenancy had the effect of creating an incumbrance, the transferee being regarded as the holder of a rent-free tenure. *Shib Doss Banerjee v. Baman Doss Mookerjee*, (1) following *Sreenath Chuckerbutty v. Sreemunto Lushkur* (2). Finally, Act VIII of 1885, while leaving Regulation VIII of 1819 untouched, repealed Act X of 1859 and provided a procedure for bringing all saleable tenures to sale for arrears of rent. It reproduced in effect the provisions of Act VIII (B.C.) of 1865 in regard to incumbrances and added a definition of the term incumbrance.

Therefore upon the analogy of the rulings under Act VIII (B.C.) of 1865 and in the absence of anything in the present Act which compels us to adopt a contrary interpretation, I think it would be reasonable to hold that a purchaser from a registered tenant is in the position of a rent-free sub-tenant and is still an incumbrancer within the meaning of section 161 of the present Act.

In *Jogeshwar Majumdar v. Abed Mahomed Sirkar* (3) the point for consideration before the Court was whether a tenancy granted by a patniadar was an incumbrance within the meaning of the Patni Regulation, but in giving judgment Rampini, J., observed that a lease just as much as a sale gift or mortgage must come within the meaning of the word "incumbrance." It is true the correctness of that decision was doubted by Caspersz and Doss' JJ., in *Tamizuddin Khan v. Khoda Nawaz Khan* (4) where they held that the sale of a portion of a non-transferable holding was not an incumbrance within the meaning of section 86 of the Bengal Tenancy Act. But, with regard to this case, it is to be observed in the first place that sections 85 and 86 of the Bengal Tenancy Act (Act VIII of 1885), contain no definition of the term incumbrance and in the second place that the Court was to some extent at least influenced by the consideration that the transfer, having taken place without the consent of the superior land-lord the transferer had not created any valid incumbrance.

On the other hand, in so far as the decision was authority for the proposition that a sale of a portion of a non-transferable occupancy holding was not an incumbrance, it was expressly disengaged from in *Askar Ali v.*

(1) (1871) 15 W. R. 360.

(2) (1868) 10 W. R. 467.

(3) (1896) 3 C. W. N. 13.

(4) (1909) 14 C. W. N. 229.

Gopi Mohon Roy (1) by a Division Bench of this Court of which I was a member. In that case we relied *inter alia* on *Chundra Salai v. Kali Prosanno Chuckerbutty* (2) and were of opinion that, if an exchange created an incumbrance within the meaning of section 161 of the Bengal Tenancy Act, there was no reason why a similar result should not follow from a sale, and applying this line of reasoning to section 86 also we held that an interest in a portion of a non transferable occupancy holding acquired by purchase was an incumbrance.

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My learned brother has in the present case based his decision to some extent upon certain decisions relating to the Revenue Sales Act (Act XI of 1859). For the purposes of section 54 of that Act it has been held that the interest of a purchaser from the defaulting proprietor before default is not an incumbrance, *Bhakani Koer v. Mathura Prasad* (3) and *Annada Prasad Ghose v. Rajendra Kumar Ghose* (4). It has also been held that a person acquiring by adverse possession the interest of the defaulter before default is not an incumbrancer. These decisions, however, were founded upon a consideration of the policy of the Revenue Sales Act and it was felt that, in the absence of any definition of the term incumbrance, it would not be right to apply the term to the interest of a purchaser from the defaulter, for in that case the auction purchaser would get nothing at all—a state of affairs which would completely defeat the object of the framers, which was the security of the revenue. No such considerations of policy arise in reference to sales held under Act VIII of 1865 and still less to those under Act VIII of 1885, which gives by definition a specific meaning to the term. Indeed, on general principles I cannot see how an interest acquired by purchase can be distinguished from one acquired by exchange or adverse possession.

It appears to be settled that for the purposes whether of the Patni Regulation or Act VIII, 1865, or of the Assam Land Revenue Regulation a person who acquires by adverse possession some part of the right of the registered tenant is an incumbrancer. I see no reason for doubting that he would also be an incumbrancer within the meaning of section 161 of Act VIII of 1885 notwithstanding the fact that the acquisition of his interest means the complete destruction of the tenant's interest in the portion so acquired. On principle therefore the complete extinction of the tenant's interest in a part of the tenancy does not seem to be inconsistent with the terms of section 161.

But in the case before us there is a further ground for holding the interest of the transferee to be an incumbrance. That ground is that the

(1) (1913) 18 C. L. J. 257.

(3) (1907) C. L. J. 1, 20, 21.

(2) (1895) I. L. R. 23 Calc. 254.

(4) (1901) I. L. R. 29 Calc. 223.

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Therefore upon the analogy of the rulings under Act VIII (B.C.) of 1865 and in the absence of anything in the present Act which compels us to adopt a contrary interpretation, I think it would be reasonable to hold that a purchaser from a registered tenant is in the position of a rent-free sub-tenant and is still an incumbrancer within the meaning of section 161 of the present Act.

In *Jogeshwar Majumdar v. Abed Mahomed Sirkar* (3) the point for consideration before the Court was whether a tenancy granted by a patnidar was an incumbrance within the meaning of the Patni Regulation, but in giving judgment Rampini, J., observed that a lease just as much as a sale gift or mortgage must come within the meaning of the word "incumbrance." It is true the correctness of that decision was doubted by Caspersz and Doss JJ., in *Tamizuddin Khan v. Khoda Naqaz Khan* (4) where they held that the sale of a portion of a non-transferable holding was not an incumbrance within the meaning of section 86 of the Bengal Tenancy Act. But, with regard to this case, it is to be observed in the first place that sections 85 and 86 of the Bengal Tenancy Act (Act VIII of 1885), contain no definition of the term incumbrance and in the second place that the Court was to some extent at least influenced by the consideration that the transfer, having taken place without the consent of the superior landlord the transferor had not created any valid incumbrance.

On the other hand, in so far as the decision was authority for the proposition that a sale of a portion of a non-transferable occupancy holding was not an incumbrance, it was expressly disented from in *Askar Ali v.*

(1) (1871) 15 W. R. 360

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My learned brother has in the present case based his decision to some extent upon certain decisions relating to the Revenue Sales Act (Act XI of 1859). For the purposes of section 54 of that Act it has been held that the interest of a purchaser from the defaulting proprietor before default is not an incumbrance, *Bhaicani Koer v. Mathura Prasad* (3) and *Annada Ghose v. Rajendra Kumar Ghose* (4). It has also been held that a person acquiring by adverse possession the interest of the defaulter before default is not an incumbrancer. These decisions, however, were founded upon a consideration of the policy of the Revenue Sales Act and it was felt that, in the absence of any definition of the term incumbrance, it would not be right to apply the term to the interest of a purchaser from the defaulter, for in that case the auction purchaser would get nothing at all—a state of affairs which would completely defeat the object of the framers, which was the security of the revenue. No such considerations of policy arise in reference to sales held under Act VIII of 1865 and still less to those under Act VIII of 1885, which gives by definition a specific meaning to the term. Indeed, on general principles I cannot see how an interest acquired by purchase can be distinguished from one acquired by exchange or adverse possession.

It appears to be settled that for the purposes whether of the Patni Regulation or Act VIII, 1865, or of the Assam Land Revenue Regulation a person who acquires by adverse possession some part of the right of the registered tenant is an incumbrancer. I see no reason for doubting that he would also be an incumbrancer within the meaning of section 161 of Act VIII of 1885 notwithstanding the fact that the acquisition of his interest means the complete destruction of the tenant's interest in the portion so acquired. On principle therefore the complete extinction of the tenant's interest in a part of the tenancy does not seem to be inconsistent with the terms of section 161.

But in the case before us there is a further ground for holding the interest of the transferee to be an incumbrance. That ground is that the

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purchaser having acquired a fractional share and not being entitled to claim registration under the Patni Regulation the extinction of the purchaser's interest *qua* the landlord is not complete. There has therefore been no complete extinction of the tenant's interest.

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The result is that I summarise the grounds upon which I base my judgment as follows :--

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(i) The definition in section 161 of the Bengal Tenancy Act covers the sale of a portion.

(ii) The reported decisions seem to support the view I have taken with the exception of the cases under Act XI of 1859, which do not apply and *Tamizuddin v. Khoda Nawaz Khan* (1) which has been dissented from.

(iii) No question of policy stands in the way.

I would, therefore, dismiss the appeal with costs.

Babu Prabodh Kumar Das, for the appellant. The sole question for decision is whether the interest which an unrecorded co-sharer has in the tenure is an incumbrance or not. My submission is that the co-sharer's interest represents a part and parcel of the tenure and it cannot be said that such an interest is an incumbrance on the tenure. If, by the auction sale the whole tenure passed to the purchaser, it cannot be said that the co-sharer's interest did not pass, and that his interest continues to exist unless annulled by the procedure laid down in section 167 of the Bengal Tenancy Act. "Incumbrance" has been defined in section 161 B.T. Act. The proper interpretation of the definition would indicate that incumbrances are those rights which are carved out of or superadded to the original tenure, i.e., something created out of the several interests which constitute and form the tenure at its inception. It refers, so to say, to the quality or kind of rights which constitutes the tenure, and not to the quantity or extent of rights possessed by any individual. Refers to the meaning of incumbrance given in Stroud's Judicial Dictionary, and Wharton's Law Lexicon. The limitation of rights must be in derogation of

the original rights and not a complete severance of the quantity of interest which one has. *Vide Tamizuddin Khan v. Khoda Nawaz Khan* (1) and *Bhawani Koer v. Mathura Prasad* (2).

Babu Dhirendra Lal Kastagir, for the respondent. The sole point is whether, in section 161 of the Bengal Tenancy Act, an incumbrance is an interest created in limitation of the rights of talukdars.

[JENKINS C.J. It is quality of interest and not extent or area of tenure.]

The decision in the case of *Chundra Sakai v. Kalli Prosanno Chuckerbutty* (3) is in favour of my contention that a sale will be an incumbrance also. *Vide* the Transfer of Property Act, sections 54 and 118, for the definition of "sale" and "exchange". See also Regulation 8 of 1879, sections 11 and 15.) Under the Patni Sale Law notice is given by General Proclamation; while, under section 167 of the Bengal Tenancy Act, notice is given through the Collector. The decision in *Ashar Ati v. Gopi Mohon Roy Chowdhury* (4) distinguished the decision in *Tamizuddin Khan v. Khoda Nawaz Khan* (1) and doubted the decision in *Jogeshwar Mazumdar v. Abed Mahomed Sirkar* (5). Does incumbrance include sale? Incumbrance may arise from adverse possession. Refers to *Gocool Bagdi v. Debendra Nath Sen* (6), *Sreenath Chuckerbutty v. Sreemundo Lushkur* (7), *Khantomoni Dasi v. Bijoy Chand Mahatab* (8) and *Arsadulla v. Mansubali* (9). Limitation then includes extinction also. There is no privity of contract between purchaser and landlord. The purchaser of a portion of a

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(1) (1909) 14 C. W. N. 229.

(5) (1896) 3 C. W. N. 13.

(2) (1907) 7 C. L. J. 1, 20, 21.

(6) (1911) 14 C. L. J. 136.

(3) (1895) I. L. R. 23 Calc. 254.

(7) (1868) 10 W. R. 467.

(4) (1913) 18 C. L. J. 257.

(8) (1892) I. L. R. 19 Calc. 787.

(9) (1912) 16 C. L. J. 539.

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tenure thus becomes a tenant without payment of rent. *Vide Shib Doss Banerjee v. Baman Doss Mookerjee* (1). An unregistered purchaser of a portion of a tenuie or holding acquires an interest that is only voidable, and under section 170 of the Bengal Tenancy Act, he can put in money to prevent sale: *vide Chundra Sakai v. Kalli Prosanno Chuckerbutty* (2) and *Radhika Nath Sarkar v. Rakhal Raj Gayen* (3). I submit therefore that the purchaser of a portion of a patni taluk comes within the meaning of incumbrance in section 161 of the Bengal Tenancy Act.

Babu Biraj Mohun Mazumdar, for the Deputy Registrar, followed on behalf of the minor respondent whose interest was identical with the principal respondent, and referred to *Nuffer Chandra Pal Chowdhury v. Rajendra Lal Goswami* (4), *Khanlomoni Dasi v. Bijoy Chand Mahatab* (5) and *Gopendro Chunder Mitter v. Mokaddam Hossein* (6). If exchange and adverse possession can come within the definition of incumbrance, I submit so can sale on the same principle.

Babu Prabodh Kumar Das, in reply. *Tamizuddin Khan v. Khoda Nawaz Khan* (7) is the first case under the Bengal Tenancy Act; all the other cases cited are under the Patni Regulation or Rent Act, and the meaning of incumbrance ought not to be extended further.

Cur. adv. vult.

JENKINS C.J. The point of law referred under section 98 of the Code of Civil Procedure is whether the interest of an unregistered purchaser of a portion of a patni tenure is an "incumbrance" within the

(1) (1871) 15 W.R. 360.

(4) (1897) 1 L.R. 25 Calc. 167.

(2) (1895) 1 L.R. 23 Calc. 254.

(5) (1892) 1 L.R. 19 Calc. 787.

(3) (1909) 13 C.W.N. 1175.

(6) (1894) 1 L.R. 21 Calc. 702.

(7) (1909) 14 C.W.N. 229.

meaning of section 161 of the Bengal Tenancy Act. In its practical aspect the question is whether a purchaser of a tenure under a rent decree must annul the interest of an unregistered purchaser in order to get a clear title, and whether on his failure so to do the title of the unregistered purchaser prevails against him. It is not suggested that it was a defect in the rent decree that the unregistered and unknown purchaser was not a party to the suit; the registered tenant represented the ownership of the whole tenure and the sale was not of the defendant's interest but of the whole tenure—that tenure passed to the purchaser at the sale in execution of the rent decree. The only limitation on the purchaser's acquisition was that he took, subject to the interests (if any) defined in Chapter XIV of the Bengal Tenancy Act as "protected interests", but with power to annul the interests defined in that Chapter as "incumbrances". There were no protected interests. But it is contended that the interest of the unregistered purchaser is an "incumbrance", and that, as the necessary steps to annul it were not taken, it still subsists. In support of this view reliance is placed on the meaning ascribed to the term "incumbrance" by section 161

The section runs as follows: "For the purposes of this Chapter—(a) the term 'incumbrance', used with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section."

The language used, it is maintained, extends the meaning of the term incumbrance beyond its ordinary signification so as to include any disposition of the tenancy, even an absolute assignment on sale of the entirety, and it is conceded that all that can be urged

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in favour of an assignment of a part must equally extend to an assignment of the whole; the two stand or fall together. It is difficult to understand why the inferior interests of a lien, sub-tenancy and easement alone should have been mentioned, if the intention was that the superior interest involved in an assignment was to be included in the general words. It runs counter to the first principles of construction. An incumbrance would not ordinarily mean or include an absolute assignment nor would it be a right or interest created on the tenure. Can it be said to be in limitation of the tenant's interest? I think not; these words appear to me to refer not to the area but to the quality of the tenant's interest. This view preserves the essential characteristics of a *lien*, *sub-tenancy* or *easement*, for the idea inherent in these leading words is that of a graft on a subject-matter which is not destroyed but still continues, though in a modified form. The more general words that follow are at least as susceptible of a meaning which would give effect to that idea as the wider but less appropriate one, for which the respondents contend.

It is urged, however, that there are decisions which compel me to hold an absolute sale is an incumbrance, and especial stress is laid on the case of *Chundra Sakai v. Kalli Prosanno Chuckerbutty* (1), where it was held that an exchange of land is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act.

The Court there was dealing with an exchange followed by a long possession, and the subject-matter was a holding, not a tenure. The *ratio decidendi* is to be found in these words: "The exchange by which this land was acquired by the defendant was

(1) (1895) I. L. R. 23 Calc. 254.

in limitation, if not in fact, in destruction of the original tenant's right in the holding." A distinction was thus recognised between limitation and destruction and presumably it was considered an exchange was a limitation, for section 161 does not extend to that which is in destruction of the tenant's right. Whether this be a true view of the effect of an exchange may have to be reconsidered in the future, it does not arise now. I am concerned only with an absolute sale and that in my opinion is not in limitation but in destruction of the interest to which it relates. On the question referred, therefore, I hold that the interest of an unregistered purchaser of a portion of a patni tenure is not an incumbrance within the meaning of section 161 of the Bengal Tenancy Act.

Therefore, according to the opinion of the majority of the Judges who have heard the appeal, the decree of the lower Appellate Court is reversed and a decree for possession passed in the plaintiff's favour. The case must go back to the Court of first instance for a decree as to mesne profits in accordance with Order XX, rule 12. The respondent will pay the appellant's costs of this appeal and reference.

G. S.

Appeal allowed; case remanded.

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APPELLATE CIVIL.

Before Mookerjee and Neubould JJ.

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v.

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Hindu Law—Alienation—Alienation by widow—Legal necessity—Spiritual welfare of her husband—To what extent alienation permissible—Recital in a deed, by itself not conclusive evidence.

Where a deed, by a limited owner with qualified power of alienation, is impeached, the test is whether the purpose for which the alienation was made was proper or legitimate.

Collector of Masulipatam v. Caraly Venkata (1) referred to.

Necessity is only one of the phases of the test of propriety.

Raj Lukhee v. Golool Chunder (2), *Sham Sunder Lal v. Achhan Kunwar* (3), *Bejoy Gopal Mukerji v. Girindra Nath Mukerji* (4) referred to.

The widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. An exhaustive enumeration of these religious or charitable purposes is neither possible nor necessary.

Cossinant Bysack v. Hurreesoontry Dossee (5) referred to.

This being a question purely of Hindu law, great care must be taken in coming to a decision upon that subject in order to prevent English Judges being warped by impressions made upon their minds in consequence of their habitual application of English law and the nature of English

* Appeal from Appellate Decree, No. 1113 of 1913, against the decree of C. E. Pittar, District Judge of Gaya, dated December 12, 1912, confirming the decree of Sashi Bhushan Sen, Subordinate Judge, Gaya, dated March 13, 1912.

(1) (1861) 8 Mo. I. A. 529.

(4) (1914) I. L. R. 41 Calc. 793.

(2) (1869) 13 Mo. I. A. 209.

(5) (1819) 2 Morley's Digest 193.

(3) (1893) I. L. R. 21 All. 71;

L. R. 25 I. A. 183.

decisions to which they are accustomed and to consider in what way a Hindu Court of Justice would have decided the point.

The true rule appears to be that there is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and that, within proper limits, the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit.

Bulkhoda v. Kulliani (1), *Ram Chunder Surma v. Gangagowind* (2), *Kartick Chunder v. Gour Mohur* (3), *Renjeet Ram v. Mahomed Waris* (4), *Ram Kailal Singh v. Ram Kishore Das* (5), *Churaman Sahu v. Gopi Sahu* (6), *Harmange v. Ram Gopal* (7), *Rama v. Ranja* (8), *Lalchandnarayana v. Dasu* (9), *Vuppuluri v. Garimilla* (10), *Puran Dai v. Jai Narain* (11), *Kupur v. Sebak Ria* (12), *Jojjibabu v. Doshankar* (13), *Chunitala v. Jussno* (14) referred to.

A gift of a moderate portion of the property of her husband by the widow with a view to his spiritual benefit is valid.

Whether the alienation covers a reasonable portion of the property of the husband of the lady is a question which must be determined with reference to the circumstances of each particular disposition.

Ram Chunder Surma v. Gangagowind (15), *Churaman Sahu v. Gopi Sahu* (16) referred to.

Recitals in a deed are not by themselves conclusive evidence of their truth and the facts alleged should be proved *alio nomine*.

Brij Lal v. Inda Kunear (17) referred to.

SECOND APPEAL by Khub Lal Singh and another, the defendants.

This appeal arose out of a suit brought by the plaintiff to set aside two leases granted by one Puna Koer to the defendants on nominal rents. The leases were granted to raise money for the excavation and

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| (1) (1803) 1 Mac Sel Rep 82 | (9) (1887) I L R 11 Mad 284. |
| (2) (1826) 4 Mac Sel Rep 147. | (10) (1910) I L R 34 Mad 238 |
| (3) (1864) 1 W. R 48. | (11) (1882) I L R 4 All 482 |
| (4) (1873) 21 W. R. 49 | (12) (1816) 1 Bor 405, 448 |
| (5) (1895) I L R 22 Cal 506 | (13) (1812) 1 Bor 394. |
| (6) (1909) I L R 37 Calc. 1. | (14) (1813) 1 Bor. 55, 60 |
| (7) (1913) 17 C. W. N. 782. | (15) (1826) 4 Mac Sel Rep 147 |
| (8) (1885) I L R 8 Mys. 552. | (16) (1909) I L R 37 Calc 1 |
| | (17) (1914) I L R 36 All 187. |

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conservation of a tank and for the erection of a wall in connection with a temple founded by Shyam Lall Misser shortly before his death. The premium for the two leases was Rs. 528, and the amount raised was duly applied for the aforesaid purpose. The plaintiff brought this suit for recovery of possession or declaration that he succeeded to the estate as reversionary heir and was not bound by the permanent leases granted by the widow. The plaintiff alleged that the widow Puna Kuer was the widow of his father's first cousin Shyam Lall Misser, that upon the death of Puna Kuer which took place on the 21st of Asar 1317 he inherited his properties as his heir, that Puna Kuer had only life interest in the properties left by her husband ; that she had no necessity to alienate them ; that the alienations made by her cannot bind him ; that the defendants have no right to retain possession of the properties in suit ; and that he is entitled to get possession of them by evicting the defendants therefrom. The defendant contended that the objects specified justified alienations which were consequently operative against the inheritance in the hands of the reversionary heir. Both the Courts below decreed the suit. Hence this appeal by the defendants.

Babu Lakshmi Narayan Singh (with him *Babu Swaranandan Roy*), for the appellant, submitted that the transactions were lawful and valid and were fully justified by Hindu Law. The lower Courts were wrong in holding that the excavation and the consecration of the tank and the erection of the wall, for which the money was raised, were not such necessities as justified alienation by the widow. For securing the spiritual welfare of the husband, the widow has a larger power of disposition than that which she possesses for purely worldly purposes. The excavation

and consecration of the tank was for the spiritual welfare of the deceased. The water of the tank could be used for purposes of ablution and worship and it would not be seriously contested that the act of the widow, from a religious point of view, was not a good and meritorious act. Further, excavation and consecration of a tank have always been regarded as acts of high religious merit. Therefore, the propriety and validity of the acts of the widow cannot be questioned from the point of view of Hindu Law, and as this is a question purely of Hindu Law it must be decided by Hindu Law and none other : Pandit Prannath Saraswati's Tagore Law Lectures, p. 167; *Collector of Masulipatam v. Cavalry Venkata* (1).

Mr. U. N. Roy (with him *Babu Harihar Prasad*), for the respondent, submitted that digging of the tank was not a legal necessity for it did not perpetuate the memory of the husband. The learned pleader for the appellant has based his argument on a passage in the Tagore Law Lectures, at p. 167, by Pandit Prannath Saraswati. The promotion of the spiritual welfare of the deceased is a desirable object, though it may not be a necessity like the performance of the *sradh*. Unless there is a legal necessity, the widow has no power to alienate any portion of the estate of the husband.

Bunjeet Ram v. Mahomed Waris (2) is on all fours with this case and is a direct authority on this point. It holds that the digging of a tank is not a legal necessity. The digging of a tank may be a meritorious act so far as the widow is concerned. It satisfies her vanity and it may raise her in the estimation of her friends and relatives. True, it has been held in these Courts that alienation of a portion of the husband's estate for the marriage of an unmarried daughter

(1) (1861) 8 Mys. L. A. 529

(2) (1871) 21 W. R. 49

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The test is, is the transaction fair and proper, lawful and valid, and justified by Hindu Law; necessity is only one of the phases of the test of propriety. This is manifest from the observations of Sir James Colvile in *Raj Lukhee v. Gokool Chunder* (1), of Lord Davey in *Sham Sunder v. Achhan Kunwar* (2), and of Lord Moulton in *Rejoy Gopal v. Girindra Nath* (3). It is unquestionable then that the widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. An exhaustive enumeration of these religious or charitable purposes is neither possible nor necessary; but some of them were mentioned by way of illustration in an opinion of *pandits* quoted with approval by Lord Gifford in delivering the judgment of the Judicial Committee in *Cossinaut Bysack v. Hurrosoondry* (4); Clarke's Rules and Orders, 1834, p. 91; Montrou, Cases on Hindu Law, p. 477; Vyavastha Darpan, 1st edition, p. 97, 2nd edition, p. 89; "religious purposes include dowry to a daughter, building temples for religious worship, digging tanks and the like." The *pandits* added: "the widow has a life-interest in both (moveable and immoveable property), and is entitled to the enjoyment of the same, and to dispose of the same by gift, mortgage, sale or otherwise for the benefit of her departed husband's soul, even without the consent of her husband's kinsmen; in so doing, she will observe moderation." We may here refer to some very weighty observations made by Lord Gifford on the mode of determination of questions of this character by our tribunals: "this being

(1) (1869) 13 Moo I. A. 209.

(3) (1914) I. L. R. 41 Calc 793.

(2) (1893) I. L. R. 21 All. 71;

(4) (1919) 2 Morley's Digest 193

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a question purely of Hindu Law, great care must be taken in coming to a decision upon that subject, in order to prevent the judgment of English Judges being warped by impressions made upon their minds in consequence of their habitual application of English Law and the nature of English decisions to which they are accustomed; and to consider in what way a Hindu Court of Justice would have decided the point." These remarks could hardly have been borne in mind in some of the decisions quoted before us. It is not necessary for our present purpose to enter upon a minute analysis of the cases on the subject, but reference may be made to the decisions in *Mukhoda v. Kulleani* (1), *Ram Chunder v. Gungayovind* (2), *Kartick Chunder v. Gour Mohun* (3), *Runjeet Ram v. Mahomed Waris* (4), *Ram Kawal v. Ram Kishore* (5), *Churaman v. Gopi Sahu* (6), *Harmanage v. Ram Gopal* (7), *Joggiban v. Deoshankar* (8), *Kupur v. Srbak Ram* (9), *Chunilal v. Jussoo* (10), *Gopalla v. Narayana* (11), *Rama v. Ranga* (12), *Lakhsminarayana v. Dasu* (13), *Vuppuluri v. Garimilla* (14), *Gudimetta v. Bollozu* (15), *Puran Dai v. Jai Narain* (16). These cases generally recognise the doctrine that a Hindu widow, daughter, or mother, is entitled to alienate a small portion of the estate in her hands for religious purposes, though the actual result reached in individual decisions may be open to criticism upon their special facts. In some of these cases, however, a distinction is drawn between acts of which the religious

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| (1) (1801) 1 Mac. Sel. Rep. 82. | (9) (1816) 1 Bor. 405, 448. |
| (2) (1826) 4 Mac. Sel. Rep. 147. | (10) (1813) 1 Bor. 55, 60. |
| (3) (1864) 1 W. R. 48. | (11) (1850) Madras S. D. A. 74. |
| (4) (1873) 21 W. R. 49. | (12) (1885) I. L. R. 8 Mad. 552 |
| (5) (1895) I. L. R. 22 Calc. 506. | (13) (1887) I. L. R. 11 Mad. 288. |
| (6) (1909) I. L. R. 37 Calc. 1. | (14) (1910) I. L. R. 34 Mad. 288. |
| (7) (1913) 17 C. W. N. 782 | (15) (1912) 23 Mad. L. J. 233. |
| (8) (1812) 1 Bor. 394. | (16) (1892) I. L. R. 4 All 492. |

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merit is solely acquired by the female heir and acts of which the religious merit accrues to the deceased or is shared by the female heir with him. As Prannath Saraswati points out, however, in his erudite Lectures on the Hindu Law of Endowments (p. 167) this distinction is not supported by the texts in the case of the widow, though it may be valid in the case of the daughter or the mother. According to a text of Vrihaspati quoted in the Dayabhaga, Chapter XI, section 1, the husband and wife participate in the effects of good and evil actions, and this mutual relation is not dissolved by the death of either partner. This is emphasised in another passage (Dayabhaga, Chapter XI, section 1, cl. 43 and 44) where it is expressly stated that the widow performs acts spiritually beneficial to her husband from the date of her widowhood, and she is enjoined to be assiduous in the performance of religious duties, because, according to a text of Vyasa, she thereby conveys her husband, though abiding in another world, and herself, to a reign of bliss. To the same effect is the Viramitrodaya of Mitra Misra, Chapter III, Part I, section 3 (Sastri Golap Chandra Saikar's Translation, p. 136) where reference is made to a text of Katyayana which recognises the right of the widow to make gifts for spiritual purposes and also to mortgage or sell so much as is sufficient for such purposes even in religious ceremonies that are optional, and, *& fortiori*, in those daily and occasional ceremonies which are enjoined by the Sastras and the omission whereof entails demerit. The Viramitrodaya (p. 141) also maintains that in making gifts for spiritual purposes as well as in making sale or mortgage for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right extends to the entire estate of her husband ; the author, in fact, reads the injunction

as to moderation as restricted to improper temporal uses. This view, however, has not been accepted, and it has been ruled that a gift of a moderate portion of the property of her husband by the widow, with a view to his spiritual benefit, is valid: see Jagannath's Digest, translated by Colebrooke, Book I, Ch. 5, sec. 3, pl. 195, Book II, Ch. 4, sec. I, pl. 2 and 3, Book V, Ch. 8, pl. 399. The true rule thus appears to be that there is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and that, within proper limits, the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit.

Tested in the light of these principles, what is the position of the parties here? Shyam Lall Misser had, shortly before his death, founded a temple. His widow raised Rs 528 by the grant of two perpetual leases with a view to excavate and consecrate a tank and to complete the walls of the temple buildings. The deeds contain recitals that her husband had enjoined her to carry out the works mentioned. These recitals, as pointed out by the Judicial Committee in *Brij Lal v. Inda Kunwar* (1) are not by themselves conclusive evidence of their truth, and the facts alleged should be proved *aliunde*. But, obviously, after the death of both Shyam Lall Misser and Puna Koer, independent evidence is not likely to be available for the determination of the question, whether or not the husband gave any specific instructions to the widow. Assume, then, that the alleged instructions have not been proved, still the fact remains that the widow raised money and applied the same for completion of the buildings and for the

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excavation and consecration of a tank in connection with the temple. The water of the tank would be needed for purposes of ablution and worship; but, even apart from this, the excavation and consecration of a tank are acts of high religious merit, as is authoritatively laid down in a series of texts quoted in the *Jalashaotsurgatattva* of Raghunandana and the *Chaturvargachintamoni* of Hemadri (*Danakhanda*, Ch. XIII, Asiatic Society's Ed., p. 1,003). Many of these texts, which extol the religious merit of the construction, consecration and maintenance of tanks and other reservoirs for storage of water, are translated by Prannath Saraswati in his tenth lecture on the Hindu law of endowments. We feel no doubt what answer a Hindu Court of Justice would have given, if a question had been raised before it as to the propriety and validity of these acts of the widow from the point of view of Hindu law. As Lord Gifford said in *Cossinair v. Hurroosoondry* (1), it is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition. In the case before us, the disposition has been made for the performance of a work of recognised religious merit and cannot consequently be treated as other than lawful, valid and proper.

One other question requires consideration, namely, whether the alienation covers a reasonable portion of the property of the husband of the lady; this, as Lord Gifford said, must be determined with reference to the circumstances of the particular disposition.

The Courts below did not direct their attention to

this aspect of the case, possibly because its true bearing on the question in issue was not realised, and it seemed at one stage as if a remand might be necessary for the investigation of this point on fresh evidence. An examination of the record, however, shows that there are materials sufficient to enable us to come to a conclusion on the matter. Several other suits were instituted simultaneously with the present suit for the cancellation of other alienations by Purna Kuer. These cases show that Shyam Lall Misser left more than ten bighas of land and that the area now in dispute slightly exceeds two bighas. We are of opinion that, in the circumstances of this case, the area alienated did not constitute an unreasonably large fraction of the entire estate. In the case of *Ram Chandra v. Gunga Govind*(1), the *pandits* indicated their opinion that the widow might validly alienate for religious purposes three-sixteenth of her husband's property. In *Churaman v. Gopi Sahu* (2), the gift which was sustained was of a portion of the estate, worth more than one-fourth and less than one-third of the total value. In these circumstances we are unable to say that the alienation was unreasonable in extent.

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

S. K. B

Appeal allowed.

(1) (1826) 4 Mad. Sel. Rep. 147.

(2) (1909) I L. R. 37 Calc. 1

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excavation and consecration of a tank in connection with the temple. The water of the tank would be needed for purposes of ablution and worship; but, even apart from this, the excavation and consecration of a tank are acts of high religious merit, as is authoritatively laid down in a series of texts quoted in the *Jalashaotsargatattva* of Raghunandana and the *Chaturvargachintamoni* of Hemadri (*Danakhanda*, Ch. XIII, Asiatic Society's Ed., p. 1,003). Many of these texts, which extol the religious merit of the construction, consecration and maintenance of tanks and other reservoirs for storage of water, are translated by Prannath Saraswati in his tenth lecture on the Hindu law of endowments. We feel no doubt what answer a Hindu Court of Justice would have given, if a question had been raised before it as to the propriety and validity of these acts of the widow from the point of view of Hindu law. As Lord Gifford said in *Cossinault v. Hurroosoondry* (1), it is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition. In the case before us, the disposition has been made for the performance of a work of recognised religious merit and cannot consequently be treated as other than lawful, valid and proper.

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this aspect of the case, possibly because its true bearing on the question in issue was not realised, and it seemed at one stage as if a remand might be necessary for the investigation of this point on fresh evidence. An examination of the record, however, shows that there are materials sufficient to enable us to come to a conclusion on the matter. Several other suits were instituted simultaneously with the present suit for the cancellation of other alienations by Punia Kuer. These cases show that Shyam Lall Misser left more than ten bighas of land and that the area now in dispute slightly exceeds two bighas. We are of opinion that, in the circumstances of this case, the area alienated did not constitute an unreasonably large fraction of the entire estate. In the case of *Ram Chandra v. Gunga Govind*(1), the *pandits* indicated their opinion that the widow might validly alienate for religious purposes three-sixteenth of her husband's property. In *Churaman v. Gopi Sahu* (2), the gift which was sustained was of a portion of the estate, worth more than one-fourth and less than one-third of the total value. In these circumstances we are unable to say that the alienation was unreasonable in extent.

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(1) (1826) 4 Mad. Sel. Rep. 147

(2) (1909) I L. R. 37 Calc 1

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CIVIL RULE.

Before Jenkins C. J., and Holmwood J.

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AMRITA LAL KUNDU

v.

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*Liquidator—Registered company—Property of the company, vesting of—
Official Assignee—I distribution of proceeds in Court, when governed by
Civil Procedure Code (Act V of 1908)—Release—Companies Act (VII
of 1913) ss. 2 (3), 3 (3) 171, 215, 232.*

The liquidator of a registered company differs in this respect from the Official Assignee in that the property of the Company does not vest in him.

The distribution of the proceeds which had come into Court before an application was made (to the High Court) to pass an order in favour of the liquidator, must be governed by the provisions of the Code of Civil Procedure.

RULE obtained by Amrita Lal Kundu, the Liquidator to the Howrah Engineering Co. Ltd., petitioner.

This was a Rule issued under section 25 of the Provincial Small Cause Courts Act. In this case one Anukul Chandra Das, a creditor of the Howrah Engineering Co. Ltd. (which was a company registered under the Indian Companies Act) had obtained a decree against them in the Small Cause Court at Howrah, and in execution thereof attached and removed some of the working machines of the said company and was about to put them to sale when the shareholders passed a resolution for voluntary winding up, appointing the petitioner sole liquidator. Thereupon the latter sought to stay the sale proceedings and to release the moveables from attachment and

* Civil Rule, No. 694 of 1915, against the order of A. T. Ghose, Judge, Small Cause Court, Howrah, dated June 19, 1915.

custody of the Court. At the hearing the liquidator failed to produce the Registrar's certificate of liquidation and the Court held it would be unjust to stay the sale under the above circumstances.

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Babu Jnanendra Nath Sarkar showed cause for the opposite party. These applications were made before the Court of Small Causes—it is not known under what section of the Act—but presumably under section 215 of the Indian Companies Act. But “the Court” referred to in section 215 is the Court having jurisdiction under that Act: *vide* section 2 (3) thereof. Section 3 speaks of the exclusive jurisdiction of the High Court which may be extended to some District Courts but never to Small Cause Courts.

[*HOLMWOOD J.* Then the Small Cause Court had no jurisdiction to entertain this application. But it has proceeded to make an order on the supposition that it had.]

But there is that saving sub-clause (3) in section 3 which saves me from the control of that section while the petitioner still remains affected by it.

[*HOLMWOOD J.* Is the Subordinate Judge of Howrah, or even the District Judge of Hooghly empowered under section 3 by the Local Government?]

I am not aware of any notification.

[*HOLMWOOD J.* Then the petitioner ought to have come to the High Court.]

Conceding for the sake of argument that the application was made in a proper Court, avoidance of an “attachment” is only contemplated in section 232 of the Indian Companies Act. This section does not contemplate the case of voluntary liquidation; and even if it did, it provides for cases of attachment put in force after the commencement of the winding up.

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But in this case the attachment was in force before such winding up.

[HOLMWOOD J. But their case is under section 171 of the Indian Companies Act.]

Section 171 can be of no help in the case of a voluntary winding up where no winding up order has been made by Court. This seems to be the condition precedent, *viz.*, that first an order winding up the company must be made by a competent Court before all the proceedings can be stayed.

[JENKINS C. J. I think the petitioner relies on section 215 of the Indian Companies Act.]

How can that section be made applicable to this case? Section 215 does not give the Court any power which it may exercise, but only lays down the consequences that will follow an order of a Court for the winding up of the company. This has nothing to do with voluntary winding up.

[JENKINS C. J. I think section 215 is quite applicable to this case.]

Granting that the Court could use its discretion under section 215, what occasion was there for the exercise of this discretion? The law is as stated in Halsbury's Laws of England under the head of "Company" in Vol. V, at p. 535: *In re Great Ship Co. Ltd., Parry's Case* (1).

[JENKINS C. J. But is the attaching creditor a secured creditor?]

Yes, as will appear from reading section 64 of the Code of Civil Procedure. This is the law in England: see Halsbury, Vol V, "Company," at p. 519.

[JENKINS C. J. But the law in India, I believe, is different on this point: see Maclean C. J.'s Judgment in the case of *Frederick Peacock v. Matan Gopal* (2).]

That relates to an Insolvency case and is not under the Indian Companies Act. Here the liquidator is seeking to have the attachment released. Is there any express provision of law under which he can get it? Unless there is such an express provision of law laid down anywhere, the Court has no power to release a valid attachment made by a creditor. The decision in *In re Witherensea Brickworks* (1) makes the point clear. In India also, though as a matter of fact, the Provincial Insolvency Act contains a provision for avoidance of attachment even before insolvency (*vide* section 35 thereof), the Companies Act does not contain any such provision except in section 232 which only contemplates cases of attachment after the winding up of the company.

Babu Ramani Mohan Chatterjee, for the petitioner, in support of the Rule. The attachment has become void under section 171. As soon as the company is wound up, all proceedings against it must be stopped by the Court to which an application is made to that effect. The property of the company vests in the liquidator and the Court is bound to release the attachment.

[*JENKINS C. J.* A company's property does not vest in the liquidator who is in this respect in a different position from the Official Assignee.]

But the liquidator is a trustee for all the creditors among whom the property is to be divided *pari passu* and as such upon the analogy of the principle enunciated in the case of *Frederick Peacock v. Madan Gopal* (2), the property of the company ought to vest in him.

[*JENKINS C. J.* There is no provision of law to that effect.]

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[JENKINS C. J. There is no provision of law to that effect.]

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JENKINS C. J. AND HOLMWOOD J. We must discharge this Rule. Though the matter is by no means clear we feel that apart from any defect of jurisdiction the distribution of the proceeds in Court must be governed by the provisions of the Code of Civil Procedure. The proceeds came into Court before the application was made to us to pass an order in favour of the liquidator. The liquidator's argument before us has been to a certain degree based upon the idea that the property of the company vested in the liquidator. It is better that that idea should be at once removed. The liquidator of a company differs in this respect from the Official Assignee in that the property of the company does not vest in him. We are of course leaving out of consideration the possible vesting of the property of an unregistered company under a *vesting order*.

The opposite party will get his costs of this Rule.

G. S.

Rule discharged.

CRIMINAL REVISION.*Before Greaves and Walmsley JJ.*

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EMPEROR.*

Security for good behaviour—Dissemination of matter likely to promote enmity or hatred between classes—Necessity of intention—Criminal Procedure Code (Act V of 1878) s. 108 (b)—Penal Code (Act XLV of 1860) s. 153A.

To justify an order under s. 108 (b) of the Criminal Procedure Code, it is sufficient that the words used are likely to promote feelings of enmity or hatred between different classes, and it is not necessary to establish an intention to promote such feelings as it would be on a trial for the offence under s. 153 A of the Penal Code.

Dhammaloka v. Emperor (1) dissented from

Jay Chandra Sarkar v. Emperor (2), *Jaswant Rai v. Athavale* (3) referred to.

The facts of the case were as follows. On the 26th November 1914, the petitioner circulated in the town of Monghyr, during the *Mohurrum* festival, personally and by agents, copies of an anonymous pamphlet called "Apna Sanatan Dharm Patchano" printed at the "Star Press". Upon a police report, dated 8th December 1914, the District Magistrate of Monghyr drew up a proceeding under s. 108 (b) of the Criminal Procedure Code, on the 13th March 1915, against the petitioner requiring him to execute a bond in the

*Criminal Revision No. 1168 of 1915, against the order of J. Johnston, District Magistrate of Monghyr, dated July 8, 1915.

(1) (1911) 12 Cr. L. J. 248. (3) (1917) 5 Cr. L. J. 439.

(2) (1910) I. L. R. 3² Calc. 214, 225. 10 Punj. Rec. 23.

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JENKINS C. J. AND HOLMWOOD J. We must discharge this Rule. Though the matter is by no means clear we feel that apart from any defect of jurisdiction the distribution of the proceeds in Court must be governed by the provisions of the Code of Civil Procedure. The proceeds came into Court before the application was made to us to pass an order in favour of the liquidator. The liquidator's argument before us has been to a certain degree based upon the idea that the property of the company vested in the liquidator. It is better that that idea should be at once removed. The liquidator of a company differs in this respect from the Official Assignee in that the property of the company does not vest in him. We are of course leaving out of consideration the possible vesting of the property of an unregistered company under a vesting order.

The opposite party will get his costs of this Rule.

G. S.

Rule discharged.

CRIMINAL REVISION.

Before Greaves and Walmley JJ

SITAL PRASAD

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EMPEROR.*

Nov. 17.

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(2) (1910) I. L. R. 38 Calc. 214, 225.

10 Punj. Rep. 21.

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sum of Rs. 2,000. with two sureties each in the amount of Rs. 1,000, to be of good behaviour for one year.

The contents of the pamphlet were thus summarized in the judgment of the District Magistrate.

The leaflet is an appeal to those Hindus whom the writer considers to be associating too much with Mahomedans, and particularly criticises their taking part in Mahomedan festivals. Various strong expressions are used. Thus the Mahomedans are described as "beef-eaters," the "destroyers of *vedas* and *shastras*" and "untouchable." Things mentioned as leading to conversion to Mahomedanism are said to be whore-mongering drinking liquor, contamination by touch, degraded ways of life and absence of fixed rules of conduct. The Mahomedan festivals are described as rude and churlish, and those who take part in them as a handful of ignorant Mahomedans. Then Mahomedanism is described as a religion on the basis of which thousands of Hindu temples have been demolished, images of gods and goddesses broken down, libraries of *vedas* and *shastras* used as fuel for heating baths, places of pilgrimage destroyed and mosques built on their sites, crores of cows slaughtered and crores of Hindu widows enticed out of their own faith. To take part in their festivities is alleged to be condemned in the *shastras* as a sin of the same gravity as killing a cow, killing a Brahman or cohabiting with the wife of one's guru. The Hindus are then advised not to take part in Mahomedan festivals and, if they cannot help doing so, to require the Mahomedans to take part in theirs, a thing which it is said they never do and consider to be a sin. The leaflet then winds up with a reminder that under the British rule nobody can compel anybody else to join in the rites and ceremonies of his religion, and closes with a Sanskrit verse that one's own religion is always the best.

The petitioner was, after an enquiry, bound down on the 8th July 1915, and obtained the present Rule from the High Court.

Babu Dasarathi Sanyal (with him *Babu Sivandan Roy* and *Babu Rajendra Prasad*), for the petitioner. To bind down a party under section 108 (b) of the Criminal Procedure Code, the offence under s. 153A of the Penal Code must be established, and intention is an ingredient of the latter: *Joy Chandra Sarkar v. Emperor* (1), *Jaswant Rui v. Athavale* (2).

(1) (1910) I. L. R. 38 Calc. 214, 225. (2) (1907) 5 Cr. L. J. 439:

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Reg. Sulliran (1), *Reg. v. Burns* (2). Reading the leaflet as a whole, there was no intention to stir up enmity or hatred, the object being to prevent Hindus from joining in the *Moharram* festival.

Mr. S. Ahmed, for the Crown. Section 108(b) of the Criminal Procedure Code does not require proof of all the elements of the offence under s. 153A of the Penal Code. It refers to "matters punishable under s. 153A", that is, matters by which enmity between classes may be promoted. The intention to promote such enmity is immaterial as long as there is intentional dissemination of matter likely to promote enmity or hatred. A distinction must be drawn between a prosecution under s. 153A of the Penal Code and precautionary proceedings under s. 108(b) of the Criminal Procedure Code. If the former failed, would it bar the latter? Next, assuming that proof of intention is necessary in a proceeding under s. 108(b), it is present here. It must be gathered from the writing and the conduct of the accused in personally distributing the leaflets. [Cites three passages as evidencing intention.] A reference to ancient history does not justify language in a leaflet likely to promote enmity : *Jaswant Rai v. Atharale* (3). Abuse of Mahomedans was not necessary for the alleged object of the accused, viz., to prevent participation by Hindus in the *Moharrum*. The Explanation to s. 153A does not apply. There was here a direct promotion of ill-feeling and no question of removal of matters producing enmity or hatred.

Babu Dasarathi Sanyal, in reply.

GREAVES AND WALMSLEY JJ. The petitioner in this case has been bound down under s. 108 (b)

(1) (1868) 11 Cox. C. C. 44, 47. (3) (1907) 5 Cr. L. J. 439 ;
(2) (1886) 16 Cox. C. C. 375, 363. 16 Panj. Dec. 23

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of the Criminal Procedure Code. We granted a Rule calling on the District Magistrate to show cause why the order should not be set aside on the ground that upon the true construction and interpretation of the leaflet, as a whole, the Court below ought to have held that it does not contain any matter the dissemination of which is punishable under s. 153A of the Indian Penal Code, which necessitates there being an intention to promote feelings of enmity or hatred. On behalf of the petitioner it was contended that even if the matter, or some of the matter, contained in the leaflet was likely to promote feeling of enmity or hated, there could be no order made under s. 108, unless the Court was satisfied that there was an intention in using the words of the leaflet to promote or attempt to promote feelings of enmity or hatred, and we were referred to *Joy Chandra Sarkar v. Emperor* (1) as an authority that for a conviction under s. 153A there must be a deliberate attempt to excite class against class and an intention to create enmity. We were also referred to a case, *Jaswant Rai v. Athavale* (2), which lays down that to constitute an offence under s. 153A there must be an intention to promote feelings of enmity and hatred. We were further referred to two English cases: *Reg. v. Sullivan* (3) and *Reg. v. Burns* (4)—cases under the English Common Law which were cited before us as authorities for the proposition that to constitute an offence under section 153A, which is said to be founded upon the principles of the English Common Law, there must be intention. The only case to which we were referred, which is an actual decision under section 108(b) of the Criminal Procedure Code, is the case of *Dhammoloka*

(1) (1910) I. L. R. 33 Calc. 214, 225. (3) (1868) 11 Cox C. C. 44.

(2) (1907) 5 Cr. L. J. 439; (4) (1886) 16 Cox C. C. 355

v. *Emperor* (1). It is a case decided in the Lower Burma Chief Court by a single Judge, and he without ambiguity lays down the proposition that to justify an order under section 108(b) there must be an actual intention to promote or attempt to promote feelings of enmity or hatred. Our view of the section is at variance with this decision. We think that, although to constitute an offence under section 153A of the Indian Penal Code there must clearly be intention, different considerations arise with regard to the provisions of section 108(b) of the Criminal Procedure Code. It is true that the words of the section are "any matter the publication of which is punishable under section 153A of the Indian Penal Code." But in our view, in order to justify an order under section 108(b), one has only got to find that there are words used in the leaflet, or matter complained of, which are likely to promote feelings of enmity or hatred; and once one has got those words present, there is no necessity for finding intention as would be necessary if the person was placed under his trial under section 153A. If this were not so there would be no necessity for section 108 of the Criminal Procedure Code, as proceedings would be taken under section 153A of the Indian Penal Code. The result is that we have simply got to look to the actual words of the leaflet to see if there are words which, in our opinion, are likely to promote feelings of enmity or hatred. The leaflet as a whole is designed to call backsliders from the true Hindu faith to a sense of their misdeeds. If the words of the leaflet had been confined to this, there would have been nothing in respect of which the petitioner before us could have been bound down under section 108 of the Criminal Procedure Code. But it seems to us that when we read the leaflet we

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find that there are passages which go far beyond the object above mentioned, if that had been the only object. For instance, there was no necessity to refer, as the pamphlet does, to members of the Mahomedan faith as beef-eaters and destroyers of the *vedas* and the *shastras*. The passage which specially seems to us unnecessary for the alleged purpose of the pamphlet is as follows:—"Is it proper to observe the festivals and the religious observances of a religion on the basis of which thousands of our temples have been pulled down, and the images of our gods and goddesses have been burnt for heating *hamams*, for providing hot baths, many places of pilgrimage have been destroyed for the construction of mosques (and mosques built on the sites), crores of beneficial cows have been killed, and crores of ignorant widows or orphans and the helpless are deprived of (degraded from) their religion by misleading and enticement." These facts may be true historically or not, and in the history of any country or of any community or religion there are passages which are best left unrecalled. It seems to us, therefore, that in this and other passages of the pamphlet there are words which are likely to promote feelings of enmity or hatred between Hindus and members of the Mahomedan religion. Having regard to this, we consider that the order made by the District Judge of Monghyr binding down the petitioner was rightly made. The Rule is, therefore, discharged.

E. H. M

Rule discharged.

ORIGINAL CIVIL.*Before Chaudhuri J.***BUDHU LAL**

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Dec. 6.**CHATTU GOPE.***

Sanction for Prosecution—Revisional jurisdiction of High Court over Presidency Small Cause Court—Civil Procedure Code (Act V of 1908) s. 115—Criminal Procedure Code (Act V of 1908) s. 195—Stage in a judicial proceeding, what is—"Oath"—"Delay"

A Judge of the Presidency Small Cause Court, Calcutta, had dismissed six applications for sanction to prosecute the plaintiffs for having made false claims. On an application to the High Court under s. 115 of the Civil Procedure Code to set aside the orders —

Held, that under s. 195 of the Criminal Procedure Code the High Court is the superior Court to the Presidency Small Cause Court, and has power to deal with the order which was made by that Court

Held, also, that an application for leave to sue is a stage in a judicial proceeding, where such leave is necessary to give the Court jurisdiction

Held, also, that the delay in making the application for sanction to prosecute had been satisfactorily explained, and was not in the circumstances such as to prejudice the plaintiffs

APPLICATION.

A Rule had been obtained on an application made under s. 115 of the Civil Procedure Code to set aside an order made by the Third Judge of the Presidency Small Cause Court, Calcutta, refusing sanction to prosecute Budhu Lal and Raghunath Lal, who had instituted 31 suits in that Court to recover from one Chattu Gope and 37 other defendants sums of money which were alleged by the plaintiffs, Budhu Lal and Raghunath Lal, to have been lent to the several

* Application in the matter of Small Cause Court Suit No. 15292 of 1913.

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defendants on promissory notes at Calcutta. The costs of defending these suits had been undertaken by the Government of the Province of Bihar and Orissa in the following circumstances. Some time in 1912 a dispute had arisen in the Patna district between one Jagadis Narain Lal and one Ramhari Lal, regarding the possession of a village Paura the tenants of which had espoused the cause of Jagadis Narain Lal. Thereupon Ramhari Lal instituted a number of suits against many of the tenants in the Civil Courts of the Patna district. All these suits were dismissed and were declared to be false. Thereafter at, so it is alleged, Ramhari Lal's instigation the two plaintiffs, Budhu Lal and Raghunath Lal, who are related to Ramhari Lal, instituted these 31 suits in the Presidency Small Cause Court against 40 tenants of the Paura village, who on receipt of the summonses petitioned the District Magistrate of Patna and the Subdivisional Officer of Bihar. As the result of inquiries the local Government decided to defray the costs of defending these suits.

Of the 31 suits filed 29 were set down for trial; but at the hearing the plaintiffs made no attempt to prove their claims, but agreed to abide by the statements made by the defendants facing the Ganges. The defendants were accordingly affirmed and all denied liability and also denied that they had in fact ever come to Calcutta. All the suits were then dismissed with costs on the 23rd March 1914.

On the 21st December 1914, 29 applications were filed before the Third Judge of the Presidency Small Cause Court on behalf of the 38 defendants for sanction under s. 195 of the Criminal Procedure Code to prosecute the plaintiffs, Budhu Lal and Raghunath Lal, for having committed offences punishable under ss. 193 and 209 of the Indian Penal Code. Of the 29 applications

18 were subsequently withdrawn to save costs, and it was thought that the ends of Justice would be met if the plaintiffs were convicted and punished on some of the cases. The remaining 11 applications came up for hearing before the Third Judge of the Presidency Small Cause Court on the 1st May 1915; but before the hearing was commenced 5 more applications were withdrawn at the suggestion of the Court. The remaining six applications (three against each plaintiff) were then heard together and dismissed on the grounds:—

- (i) That there had been a *delay of 16 months* in making these applications, as to which no explanation had been offered;
- (ii) That as the suits had been decided *on partial oaths*, the Court was precluded from going into the merits; and
- (iii) That s. 195 of the Criminal Procedure Code did not apply because the applications for leave to sue, in which the plaintiffs had been solemnly affirmed, were made before different Judges of the Court on different dates, and because there is no provision for taking an oath at the time of taking leave to sue in the Rules of Practice of the Presidency Small Cause Court or in the Act itself.

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may be wrong, that is of itself no ground for the exercise by a High Court of the powers given by s. 115 of the Civil Procedure Code. The High Court will only exercise such power where the decision is perverse, or in cases of grave and otherwise irreparable injustice: *Kristamma Naidu v. Chapa Naidu* (1) and *Ismalji Ibrahimji Nagree v. N. C. Macleod, Receiver* (2). Further delay is fatal: *Deputy Legal Remembrancer, Bihar and Orissa v. Ram Udar Singh* (3). Delay was one of the grounds on which the lower Court rightly dismissed the applications for sanction to prosecute the plaintiffs. No explanation of the delay was offered when the applications were heard; and the fact that some explanation has now been given is no reason for interfering with the order of the lower Court.

The Standing Counsel (Mr. B. C. Mitter) (with him *Mr. N. N. Gupta*) contended that the application had been clearly brought to the proper Court: see *Ramadhan Bania v. Sewbalak Singh* (4), *Ram Charan Chanda Talukdar v. Taripullu* (5), and *In re an Attorney* (6). Delay is not a fatal objection: *Deputy Legal Remembrancer, Bihar and Orissa v. Ram Udar Singh* (3) and the delay in this case was unavoidable and has been explained.

CHAUDHURI J. In these matters, I issued Rules on the plaintiffs in the above suits to show cause why the order refusing sanction to prosecute them should not be set aside, or why an enquiry should not be directed in order to grant such sanction. The application was headed "In the matter of section 115 of

(1) (1893) I. L. R. 17 Mad. 410.

(4) (1910) I. L. R. 37 Calc. 714.

(2) (1906) I. L. R. 13 Bom. 188.

(5) (1912) I. L. R. 39 Calc. 774.

(3) (1914) 21 C. L. J. 193;

(6) (1913) I. L. R. 41 Calc. 413.

the Code of Civil Procedure," but when it was made, it appeared to me to be more appropriate to head it under the Criminal Procedure Code, and in fact the learned Standing Counsel treated it as such an application. It has been argued that it does not come under section 115 of the Code of Civil Procedure. This is not necessary to consider. Under section 195 of the Code of Criminal Procedure this Court is the superior Court of the Presidency Small Cause Court, and has power to deal with the order which was made by that Court. This has not been seriously contested by learned counsel who appeared for the plaintiffs. Formal amendment of the heading will, if necessary, be made. So far as the verification of the application before me is concerned, it is undoubtedly faulty; but inasmuch as I think that this is a fit case for an enquiry before sanction is granted, I do not think that such faulty verification much matters. The learned Judge who dealt with the application in the Small Cause Court does not appear to me to have taken a correct view of the nature of an application for leave to sue. He has held that such an application is not a stage in a judicial proceeding. It seems to me that it is, where such leave is necessary to give the Court jurisdiction. Rule 87 of the Small Cause Court requires an application for leave to sue, to be verified as a plaint. It requires the party making such an application to be present with such evidence as may be required by the Court in support of the applicant's allegations. The practice in the Small Cause Court has apparently been to take the oath of the party when he makes such an application. There is ample jurisdiction in the Court to administer an oath at that stage, and such oath, when administered, is an oath taken in the course of a judicial proceeding. I do not think it necessary in the view I take to deal with the cases which have

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been cited on this point. Learned counsel, Mr. Norton, has rightly contended there has been considerable delay in this matter. The delay has been explained in the affidavits before me. No doubt there was no explanation of the delay before the learned Judge, before whom the application was originally made; and although Mr. Pearson, who appeared for the plaintiffs, asked for such explanation, no explanation was given. It has, however, been given now. It would undoubtedly have been better if such explanation had been then given; but there is no reason to doubt the facts which have now been placed before me. In the circumstances, some of the delay was unavoidable especially, as references had to be made to the Bihar Government. The delay in this matter is not such as to lead me to think that there is any likelihood of the plaintiffs being prejudiced. The prosecution has been taken up by the Crown. I direct that an enquiry be held by the learned Judge as to whether sanction should be given upon the materials placed before the Court. The Oaths Act under which the suits were dismissed, has nothing to do with the matter. The merits of the cases were not decided, as upon a trial, but the result of the special oath was the dismissal of the suits. But the grounds, upon which the jurisdiction of the Court was invoked, when leave was asked for to institute the suits, are alleged to be false. Whether such grounds are true or untrue, are to be enquired into. I think these are fit cases for such an enquiry. If upon such enquiry it be found that the allegations were false and leave to sue was improperly obtained, sanction should be given to the Crown to prosecute the persons concerned. I make the Rules absolute. The matters being in the nature of criminal proceedings, I do not direct any costs.

W. M. C.

Rule absolute.

FULL BENCH.

*Before Sanderson C.J., Woodroffe, Mookerjee, Holmwood and
D. Chatterjee J.s.*

JNANADA SUNDARI CHOWDHURANI
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AMUDI SARKAR.*

Second Appeal—Order of Settlement Officer settling rent, whether open to second appeal—Bengal Tenancy Act (VIII of 1895), ss. 105A (4), 106, 109A—Excess area.

Per CURIAM When in a proceeding under s. 105 of the Bengal Tenancy Act the Settlement Officer is asked to increase the rent under sub-s. (4) in accordance with the rules laid down in s. 52, and the claim is refused on appeal to the Special Judge on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, a second appeal is not barred by s. 109A of that Act.

Rameswar Singh v. Bhuneswar Jha (1), and *Grant v. Ram Rekha Bhagat* (2) considered

Per MOOKERJEE J. If in any proceeding under s. 105 questions under s. 105A have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of questions within the scope of s. 105A, and consequently of s. 106. Such a decision is not one merely settling a rent within the meaning of s. 109A and is consequently liable to be challenged by way of second appeal to the High Court.

REFERENCE to Full Bench.

This was a reference made to a Full Bench by Woodroffe and Coxe JJ. on 27th July 1914 in only one

* Reference to Full Bench in Appeal from Appellate Decree No. 577 of 1909.

(1) (1906) 4 C. L. J. 132.

(2) (1910) 14 C. L. J. 110.

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out of several analogous second appeals preferred by the plaintiff against the decision of H. Walmsley, Esq., Special Judge of Mymensingh, dated 14th July 1908, modifying the decision of Babu Beni Madhab Chatterji, Settlement Officer of Mymensingh, dated 14th February 1916.

The facts are fully set out in the order of reference which was as follows :—

WOODROFFE AND COXE JJ. These appeals arise out of proceedings for the settlement of a fair and equitable rent, and the substantial question in controversy between the parties is whether the landlord is entitled to rent for the whole area ascertained by measurement to be within the tenants' holdings at the rates mentioned in the *kabuliats* which were executed by the tenants for these holdings before the passing of the Tenancy Act. One *kabuliat* has been translated and laid before us as a sample of their terms. This was executed by the tenant in respect of 6 aunes odd "described in the schedule" and the tenant promised to pay Rs. 29 odd as rent for the said lands "according to the description and rates given below". The schedule gave the area, boundaries and classification of each plot, and ended in an abstract showing (i) the total area of each class of land, (ii) the rate of rent per acre of that class, and (iii) the total rent payable for the area in each class. It was stipulated in the *kabuliat* that the landlord could have the land measured within the term, and if the area or the classification was found to be wrong, the tenant would be bound to pay additional rent or be entitled to a reduction of rent, as the case might be.

The Settlement Officer held that these stipulations in the *kabuliats* regarding the payment of rent according to the result of a further measurement were valid and decided the point in controversy in favour of the plaintiff. The learned District Judge has reversed the Settlement Officer's decision on that point and the plaintiff appeals.

It appears to us that the Settlement Officer's decision is in accordance with the principles laid down in *Rajkumar Pratap Sahay v. Ram Lal Singh* (1), and *Akbar Ali Mian v. Musamat Hira Bibi* (2), with which, on this point, we are in agreement. On the merits, therefore, we think that the appeal should succeed.

A preliminary objection, however, has been taken that no appeal lies on the ground that the decision of the District Judge is a decision settling a rent within the meaning of section 109A of the Tenancy Act. It was

held in *Albar Ali Mian v. Mussoamat Hira Bibi* (1), cited above, that in cases of this nature an appeal lay. The question, however, was not discussed and the decision proceeded on the principle of *stare decisis*, the rulings followed being *Mathura Mohun Lahiri v. Uma Sundari Debi* (2), and *Rajkumar Pratap Sahay v. Ram Lal Singh* (3), quoted above. The latter ruling is clearly in point. The facts were almost exactly the same as those of the case now before us. The decision of *Mathura Mohun Lahiri v. Uma Sundar Debi* (2), was under the un-amended Act, but the principle on which it proceeded seems to us to be the same. Under the Act as it then stood an appeal lay to this Court from the decision of a Special Judge 'in any case under section 106.' Section 106 dealt with disputes over the correctness of an entry in the record of rights (not being an entry of a rent settled). Consequently, disputes over an entry of a rent settled did not come within section 106, and so could not be the subject of an appeal to this Court. It was held, however, in the case cited that when, in proceedings taken on the application of a landlord for the settlement of rent, the liability of the tenants to pay rent on account of any alleged excess area was decided, an appeal lay to this Court.

On the other hand the opposite view was taken in *Naneswar Singh v. Bhoooneswar Jha* (4), and *Grant v. Ram Rekha Bhagat* (5), that in cases of this nature no second appeal lay. A reference to the papers of the last-mentioned case shows that in it increased rent was claimed on the ground of an increase of area. In our opinion these two cases cannot be reconciled with the other cases mentioned above, and the point can only be settled by a Full Bench.

We would formulate the point as follows : "When in a proceeding under section 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-section (4) in accordance with the rules laid down in section 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a Second Appeal barred by Section 109A of the Act ?"

We make this reference in Appeal No. 577. The other analogous appeals will remain pending till this is disposed of. The rules granted in these cases are discharged as no possible question of jurisdiction arises.

Babu Dwarkanath Chakravarti, (with him *Babu Chandra Kanta Ghose, Babu Girija Prasanna Roy*

(1) (1912) 16 C. L. J. 192. (3) (1907) 5 C. L. J. 532.

(2) (1897) 1. L. R. 25 Calc. 31. (4) (1906) 4 C. L. J. 132.

(5) (1910) 14 C. L. J. 111.

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On the other hand the opposite view was taken in *Rameswar Singh v. Bhuneswar Jha* (4), and *Grant v. Ram Rakha Bhagat* (5), that in cases of this nature no second appeal lay. A reference to the papers of the last-mentioned case shows that in it increased rent was claimed on the ground of an increase of area. In our opinion these two cases cannot be reconciled with the other cases mentioned above, and the point can only be settled by a Full Bench.

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Babu Dwarkanath Chakravarti, (with him *Babu Chandra Kanta Ghose, Babu Girija Prasanna Roy*

(1) (1912) 16 C. L. J. 182. (3) (1907) 5 C. L. J. 533.

(2) (1897) I. L. R. 25 Calc. 31. (4) (1906) 4 C. L. J. 133.

(5) (1910) 14 C. L. J. 111.

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Chowdhuri and Babu Nil Kanta Ghose), for the appellant.

[*Babu Upendra Nath Roy*. As the question is common to several other analogous appeals in which I appear with Maulvi Nurrudin Ahmed and Babu Kumar Sankar Roy, we pray that we may be heard also.]

[*SANDERSON C.J.* Only one case has been referred.]

Therefore only that case is before your Lordships under the order of reference. I have no objection to my friend appearing for the respondent.

[*SANDERSON C.J.* (to Resp.). As you are not instructed we will hear you as *amicus curiae*.]

All these cases were governed by one and the same judgment and the question referred to the Full Bench occurs in most of these cases. (Reads referring order and section 109(A) of the Bengal Tenancy Act *re* second appeals). Clause (3) provides for appeals in all matters except a settlement of rent; therefore in an appeal from the judgment of a Special Judge in which he has settled a rate of rent, the particulars are open to the High Court.

[*SANDERSON C.J.* If the High Court does not accept these particulars, it is open to them to settle a fair rate of rent.]

Re scheme, see section 101 (Chapter X of the Bengal Tenancy Act) when a record of rights can be directed by the Government of India, or the Local Government. After this record has been prepared we find section 103(a). The Settlement Officer is to invite objections, and these are decided and record is finally published. Then comes section 105(A) which was not originally in this Act, being a new section added in 1907 to the old Act. In this appeal we are concerned with the law in East Bengal. Objections that might come under section 106 were raised

under section 105. Held by the Full Bench as now provided by section 105(a), that the Settlement Officer has to settle dispute and then settle rent. Therefore that matter, after all disputes are settled, is not open to second appeal. [Reads the proviso to section 109(A).] A matter already decided under section 106 need not be decided under section 105(A), and therefore the main distinction is this—if the Settlement Officer under section 105 decides any question as to *status* arising under section 105, a second appeal lies; but so far as the Settlement Officer or Special Judge decides a question (after all other disputes) as to fair rent, no second appeal lies. This shows how the proviso to section 109(A) was made.

[SANDERSON C.J. Your point then is that the decision in which this is an appeal was not a decision settling rent.]

I put it in the affirmative and not negative.

[HOLMWOOD J. Does it come under section 105A? It may come under section 106, but no suit was brought.]

The question was raised before the Settlement Officer, and it makes no difference whether it was a separate suit or not. The stipulation was that if on future measurement the area be found to be in excess the tenant would pay more rent.

[SANDERSON C.J. The question now is whether the existing rate should be applied to the new area as determination of fair rent.]

The new area would help him to determine the question of additional rent.

[SANDERSON C.J. The Settlement Officer was really deciding the area of each holding.]

The rent was mere arithmetic and may come in under clauses (e) and (f).

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[SANDERSON C.J. There is no question of liability to pay rent, only the area of the holding.]

[MOOKERJEE J. The tenant's case was that he was liable to pay for a certain area but not for what was in excess. Then the question is,—is this land in the occupation of the tenant for which he is liable to pay rent? But that is not a question under section 105(A).]

The first case is that of *Rajkumar Pratap Sahay v. Ram Lall Singh*(1). Clause (3) of section 109 is now section 109A).

The next is that of *Akbar Ali Mian v. Hira Bibi* (2). *Rajkumar Pratap Sahay's Case* (1) has already been referred to in the Full Bench decision of *Prithi Chand Lal Chowdhury v. Basarat Ali* (3) where also the question as to the competence of a second appeal was raised, this decision being approved.

[SANDERSON C.J. But no reference is made to section 105A.]

Those cases were decided before the amendment made in 1907. One of my submissions would be that the question has not only been settled by decisions of the Divisional Courts but also has found approval in the Full Bench decision.

[SANDERSON C.J.: We don't wish to hear you any further Mr. Chakravarti; we must now ask for the assistance of the *amicus curiae*.

Babu Upendra Lal Roy (amicus curiae), for the respondent: The whole question depends on the construction of section 109A. This section clearly limits the right of appeal in a case under section 105 to a decision settling rent and further limits the right of second appeal under section 100 of the new Code of Civil Procedure (corresponding to Chapter XLII

(1)(1907) 5 C. L. J. 538. (2)(1912) 16 C. L. J. 182, 183.

(3)(1909) I. L. R. 37 Calc. 30.

of the old Code). I do not find that this point was ever considered.

[MOOKERJEE J. Is not the question of the legal effect of a contract between the parties a question of law? Section 100 of the Code of Civil Procedure does not shut out an appeal.]

The lower Appellate Court has decided the matter as one of fact and not of law. I submit that a right of appeal is given subject to the provisions of section 100 of the Code of Civil Procedure.

[MOOKERJEE J. An appeal is therefore not incompetent, but limited to questions that can be taken under section 100 of the Code.]

The question referred is whether an appeal lies, and the appellant must show that a second appeal lies.

[MOOKERJEE J. That point has been decided against you by the referring Bench.]

I am prepared to show that no appeal lies.

[MOOKERJEE J. This is most extraordinary. You begin by saying that there is no question of law and thereby begin the appeal and yet say no appeal lies.]

[*Babu Dwarka Nath Chakravarti*. In *Rajkumar Pratap Sahay v. Ram Lal Singh* (1) though the appeal was incompetent still it was dismissed on the merits.]

I submit that this decision is not based on an illegal effect of the contract.

[MOOKERJEE J. You are now arguing on the basis that an appeal is competent, but no question of law arises.]

I say that no second appeal can lie and this is substantially the referring order. A second appeal lies under section 109A if certain points don't arise and if it is not covered by section 100 of the Code.

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I must lay before your Lordships two decisions where the contrary was laid down, viz., *Rameswar Singh v. Bhuneswar Jha* (1).

The next case is that of *W. M. Grant v. Ram Rekha Bhagat* (2).

[HOLMWOOD J. There is nothing in that conflicting with *Rajkumar Pratap Sahay's* case (3). In fact I clearly guarded myself on that point. We sent the case back for a finding if two points did arise, for on those two points an appeal would lie.]

In this case also there is a finding of fact that plaintiff had totally failed to prove excess area. I don't know the facts of the particular special appeal referred to the Full Bench but only of one of the analogous appeals in which I appear. The lower Appellate Court totally disbelieves plaintiffs' case and finds no excess area and purports to settle a fair and equitable rent with regard to the whole holding.

[SANDERSON C.J. I don't think the landlord is appealing from that part of the judgment regarding rent.]

The question whether there was an excess area or not is to be determined by the Court of facts

[D CHATTERJEE J. There are several particulars to be considered with regard to settling a fair rate of rent, one being increase of area, and another of rate of rent. Your submission is that the finding is one of fact and therefore no second appeal lies.]

Yes.

[MOOKERJEE J. If, as a matter of fact, rent was then based on an incorrect assumption, do you say the landlord is not now entitled to rent on the correct basis?] .

(1) (1906) I.L.R. 33 Calc. 837, 839; (2) (1910) 14 C.L.J. 110
4 C.L.J. 138 (3) (1907) 5 C.L.J. 533.

I say that the increase now found was no increase at all.

[MOOKERJEE J. But if the finding of the Subordinate Judge as to consolidated rent irrespective of area is contrary to the terms of the contract, is it not a question of law?]

On the face of it, I submit, it is not.

There can be no doubt it is a decision settling fair and equitable rent. I draw your Lordships' attention to section 105A. If in one case it is a finding of fact I do not see why in the other it should not also be a finding of fact. No doubt section 105A lays down certain particulars a settlement officer was to decide in settling fair rent.

The first thing I want to place before your Lordships is whether the case now made by my learned friend comes under any of the clauses of section 105A.

[SANDERSON C.J. Does any other learned gentleman appear in any of the other analogous cases?]

Maulvi Nurruddin Ahmed (amicus curiae), for respondent in an appeal analogous to the one referred to the Full Bench. I submit that under section 52 the Settlement Officer had jurisdiction to settle fair rent, and no appeal lies. The cases cited by the appellant refer to cases under section 30 *re* price of crops and not to cases under section 52. *Vide* the decision in *Palloo Panday v. Sri Newas Prasad Singh* (1).

If under section 105 the question of excess area can be gone into and the Settlement Officer goes into it and settles fair rent, it is a settlement of rent. I submit therefore that this is essentially a question under section 105 and therefore there is no second appeal. Of course I can't go into the merits of the case as I did not appear in the case referred to the Full Bench and this is the view of Mitra J. in *Rameshwar Singh v.*

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Bhooneswar Jha (1). In the case of *Rajkumar Pratap Sahay v. Ram Lal Singh* (2), there was no excess area and no settlement of rent, but in the present case the Judge goes into the question of fair and equitable rent, and therefore I submit he settles fair rent. *Akbar Ali Mian v. Mussamat Hira Bibi* (3), is apparently based on *Rajkumar Pratap Sahay v. Ram Lal Singh* (2), and is not against me. The decision in *Mathura Mohun Lahiri v. Uma Sundari Debi* (4), does not refer to any earlier cases in which it was held that no appeal lay in such cases.

[SANDERSON C.J. The head note does not seem to help you.]

Head notes are sometimes misleading. I shall read a portion of the judgment (I. L. R. 25 Calc. at page 34). It does not appear that in this case there was any decision settling rent. There are earlier cases in which it has been held that a decision under section 105 settling rent is not open to appeal: *Shewbarat Koer v. Nirpat Roy* (5), followed in *Lala Kirut Narain v. Pulukdhari Panday* (6), and another case in *Accha Mian Chowdhry v. Durga Churn Law* (7).

[MOOKERJEE J. What was the question there?]

I submit that case is in wider terms. The principle is that wherever there is a question of rent and that question of rent has been settled there is no second appeal.

In the case of *Rameswar Singh v. Bhooneswar Jha* (8), Mitra J.'s *dictum* in the concluding portion at page 141 has been cited with approval by Mookerjee J. in *Rajkumar Pratap Sahay v. Ram Lal Singh* (2).

[SANDERSON C.J. Is that just what the lower

(1) (1906) I L.R. 33 Calc. 837, 839. (5) (1889) I. L. R. 16 Calc. 596

(2) (1907) 5 C. L. J. 538.

(6) (1889) I. L. R. 17 Calc. 326.

(3) (1912) 16 C. L. J. 182

(7) (1897) I. L. R. 25 Calc. 146.

(4) (1897) I. L. R. 25 Calc. 34.

(8) (1906) 4 C. L. J. 139.

Court's judgment is in this case that there was no excess lands?]

In that case there was a claim of additional rent for excess area and there was no question (as here) of settling fair and equitable rent. Here the Subordinate Judge holds the landlord has failed to prove any excess lands and then has gone on to determine what is fair and equitable rent, (the application is for that only) and this is clearly a case under section 105, and if this is not a case of settlement of rent it is difficult to conceive what is.

The appellant was not called upon to reply.

SANDERSON C.J. The question which was referred to this Court relates to a preliminary point as to whether there was a second appeal, under the circumstances of this case, and it is stated at page 2 of the paper* before me as follows: "when in a proceeding under section 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-section (4) in accordance with the rules laid down in section 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by section 109A of the Act."

The Settlement Officer had decided that the tenants were in possession of land which was in excess of the area mentioned in the tenancy agreement. The tenancy agreement provided that the landlord could have the land measured within the term, and if the area or the classification was found to be wrong the tenant would be bound to pay the additional rent or be entitled to a reduction of rent, as the case might be. The Settlement Officer held that by reason of that provision it

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(8) (1916) 4 C. L. J. 138.

Court's judgment is in this case that there was no excess lands?]

In that case there was a claim of additional rent for excess area and there was no question (as here) of settling fair and equitable rent. Here the Subordinate Judge holds the landlord has failed to prove any excess lands and then has gone on to determine what is fair and equitable rent, (the application is for that only) and this is clearly a case under section 105, and if this is not a case of settlement of rent it is difficult to conceive what is.

The appellant was not called upon to reply.

SANDERSON C.J. The question which was referred to this Court relates to a preliminary point as to whether there was a second appeal, under the circumstances of this case, and it is stated at page 2 of the paper* before me as follows: "when in a proceeding under section 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-section (4) in accordance with the rules laid down in section 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by section 109A of the Act."

The Settlement Officer had decided that the tenants were in possession of land which was in excess of the area mentioned in the tenancy agreement. The tenancy agreement provided that the landlord could have the land measured within the term, and if the area or the classification was found to be wrong the tenant would be bound to pay the additional rent or be entitled to a reduction of rent, as the case might be. The Settlement Officer held that by reason of that provision it

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was open to the landlord to have the matter of the area enquired into. He, therefore, proceeded to enquire into it, and held, as I have already said, that the tenants were in fact in possession of excess land.

The tenant thereupon appealed to the Special Judge who reversed the decision of the Settlement Officer upon the question as to whether the tenants were in possession of excess land. He then proceeded to deal with the rates of rent with regard to the lands which were specified in the tenancy agreement. His judgment is to be found at pages 26 and 27 of the paper book of Appeal No. 2915 of 1908. I need not read it. He begins his judgment, with regard to the first finding in this way, "Next comes the question whether the tenants have been found to be in possession of any excess land;" and, his conclusion is that "for these reasons I hold that the Settlement Officer was wrong in finding that the tenants or many of them, are in possession of excess land." Then at page 27 he proceeds to deal with the question of rent. Now, the decision of this question depends upon a few sections of the Bengal Tenancy Act which I propose to read. The first section to which I need draw attention is section 52. I do not intend to read but merely mention it, for the purpose of showing that I have not forgotten it. Section 105 sub-section (1) provides that "when, in any case in which a settlement of land-revenue is not being made or is not about to be made, either the landlord or the tenant applies, within two months from the date of the certificate of the final publication of the record-of-rights under section 103A, sub-section (2), for a settlement of rent, the Revenue-officer shall settle a fair and equitable rent in respect of the land held by the tenant." Then section 105A provides, "where in any proceedings for the settlement of rents under this part, any of the following issues

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Now, in my judgment, section 109A clearly contemplates an appeal from the Special Judge to the High Court, *with reference to the particulars* in respect of which the decision which settles the rent is given. It was argued by the learned vakil who appeared for the appellant that the matter upon which the judgment was given in this case was a particular 'with reference to which the rent of any tenure or holding has been settled,' or to put in the negative way, it was 'not merely a decision settling a rent.' I agree with his contention. I can quite see that a matter such as this between the landlord and tenant may be a matter of great importance which may involve not only a question of fact but a question of law, as it seemed to me the question in this case did involve a question of fact as well as of law. First of all, it was alleged that under the terms of the agreement the landlord was entitled to go beyond the area which was specified in the agreement, and was entitled to have the area of the land remeasured and settled which was

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clearly a question of law, and, it also involved the question of fact whether the area contended for by the landlord was the right one or that contended for by the tenant was the right one.

For these reasons, I came to the conclusion that that part of the judgment of the Special Judge in which he overruled the judgment of the Settlement Officer, was 'not merely a decision which settled the rent'. Therefore, there was an appeal from the decision of the Special Judge to the High Court. The conclusion at which I have arrived upon a consideration of these sections is supported by the decisions which were cited on behalf of the appellant. It is only necessary for me to say, therefore, that the answer which, in my opinion, ought to be given to the question that has been referred is that the appeal in this case is not barred by section 109A of the Act.

I, therefore, think that the appeal ought to be entertained, and having been entertained it ought to be allowed, and the decision of the settlement officer restored with costs including those of both of this Reference and in the Division Bench.

WOODROFFE J. I agree that the question referred to us should be answered in the negative, and therefore an appeal lies. On the merits also, as is stated in the referring order, I think that the appeal should succeed.

MOOKERJEE J. The question referred for decision by this Full Bench has been framed in the following terms:—"When in a proceeding under section 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-section (4) in accordance with the rules laid down in section 52, and the claim is refused, on appeal to the Special Judge, on the ground that the land of the tenant is

not proved to be in excess of the area for which rent has been previously paid, is a second appeal barred by section 109A of the Act?" In my opinion, this question should be answered in the negative on a true interpretation of sub-section (3) of section 109A of the Bengal Tenancy Act. That sub-section provides that, "subject to the provisions of Chapter XLII of the Code of Civil Procedure, 1882, an appeal shall lie to the High Court from the decision of a Special Judge in any case under this section (*not being a decision settling a rent*) as if he were a Court subordinate to the High Court within the meaning of the first section of that Chapter." In the case before us, proceedings were initiated under section 105, which is mentioned in sub-sections (1) and (2) of section 109A. Consequently, an appeal lies to this Court from the decision of the Special Judge provided his decision is not "*a decision settling a rent*."

To determine the precise scope of this expression, it is necessary to examine briefly the scheme of Chapter X of the Bengal Tenancy Act in which section 109A finds a place. This chapter is divided into four parts. The first part, which treats of the preparation and publication of records-of-rights, comprises sections 101 to 103B. The second part contains sections 104 to 101J and deals with questions of settlement of rents, preparation of settlement rent rolls, and disposal of objections, in cases where a settlement of land revenue is being or is about to be made. The third part, which includes sections 105 to 109A, treats of settlement of rents and decision of disputes in cases where a settlement of land-revenue is not being or is not about to be made. The fourth part, which covers sections 109B to 115A, embodies supplemental provisions. Consequently, when a record of rights has been prepared and finally published

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under sub-section (2) of section 103A, if, as in the case before us, a settlement of land revenue is not being or is not about to be made, it is open to the parties, landlord or tenant, to initiate proceedings, either under section 105 or under section 106. Section 106 enables them to institute a suit before a Revenue-officer to challenge the correctness of the entries made in the record of rights. This may be regarded as the procedure for a direct challenge of the entries in the record. If a proceeding is, on the other hand, instituted under section 105 for a settlement of the rent by the Revenue-officer, the duty is cast upon him to settle a fair and equitable rent in respect of the land held by the tenant. Such a proceeding may follow the result of a suit, if any, instituted under section 106, or recourse may be had to it without the prior institution of a suit under that section. In the latter event, there may be an indirect challenge of the correctness of the entries in the record of rights. The provision for this contingency is embodied in section 105A, which authorises the investigation of specified particulars in the course of a settlement of fair rent under section 105, provided there has been no prior decision upon those questions in a suit under section 106.

The history of the introduction of section 105A, which was explained in the judgment of the Full Bench in *Pirthi Chand Lal Chowdhury v. Busarat Ali* (1) and later on summarised in *Paltoo Panday v. Sri Newas Prasad Singh* (2), throws light upon the solution of the question raised before us. It was pointed out in these cases that although section 105 did not by itself, in its original form, contemplate an investigation into the question of correctness of the entries in the record of rights, yet a practice had grown up

(1) (1909) I. L. R. 37 Calc 30 (2) (1913) 18 C. W. N. 165.

in proceedings under that section to decide questions which, the Legislature contemplated, should be determined by a suit under section 106. To put the matter in another way, the parties were placed in the same position as if a suit under section 106 and a proceeding under section 105 had been simultaneously instituted and consolidated, and an amalgamated trial held for the investigation of the question of fair and equitable rent. This led to the enactment of section 105A, which regularises the practice that had gradually developed; and the Revenue-officers, while seized of proceedings under section 105, were expressly authorized to determine questions mentioned in section 105A which, in the ordinary course, would form the subject of an enquiry under section 106. This conclusively answers the objection suggested in the course of the argument that the Settlement Officer in the case before us had no jurisdiction to determine the question of excess area: *Paltoo Panday v. Sri Newas Prosad Singh* (1). It follows accordingly that if in any proceeding under section 105, questions under section 105A have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of questions within the scope of section 105A, and consequently of section 106. If the order is of that description, we cannot reasonably hold that the decision of the Settlement Officer is a decision merely settling a rent within the meaning of section 109A, and consequently not liable to be challenged by way of second appeal to this Court. We cannot be invited to sacrifice substance to form, to look merely at the label and not the contents of the adjudication. If the questions specified in section 105A had been decided in a suit under

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section 106, the determination by the Revenue authorities would not be final; the appellate decision of the Special Judge would be liable to be tested in second appeal to this Court. It cannot, on principle, make any difference that those very questions have been determined by the very same authorities, in a proceeding under section 105. This view is amply borne out by the proviso to section 109A, which contemplates the possibility of interference by the High Court with the determination by the Revenue Officer and the Special Judge of the particulars essential for a settlement of fair and equitable rent. In the case before us, the substantial question in controversy between the parties was, whether the tenant was liable to pay rent in respect of what may be compendiously called "excess land." The case for the landlord was that the area in the occupation of the tenant exceeded the area mentioned in the contract of tenancy. The landlord, consequently, claimed assessment of rent on the difference between these two areas and prayed that a fair and equitable rent might be settled in respect of all the lands in the holding. The tenant repelled the suggestion that he was in possession of excess lands. The Settlement Officer came to the conclusion that the tenant was in occupation of excess area, in other words, that the area in his occupation exceeded the area for which rent had hitherto been paid by him; and he assessed fair rent on this basis. Upon appeal, the Special Judge has reversed that decision. Consequently, although the decision of the Special Judge has settled a fair and equitable rent, it has also determined a question of fundamental importance to the parties, namely, what are the lands liable to be assessed with fair and equitable rent. Clearly, a second appeal is not barred with regard to the determination of the latter question.

The distinction, I have just explained was recognised as early as 1897 in *Mathura Mohun Lahiri v. Uma Sundari Debi* (1), where a question arose, whether the tenant was in occupation of excess land. The answer depended upon the determination of the length of the standard pole used for measurement of the land. The Court of first instance went into this question and came to a finding; but upon appeal, the Special Judge declined to investigate the matter. This Court held that a second appeal was competent, as the question was in essence, not of fair and equitable rent, but of the area of the land included in the tenancy. Mr. Justice Macpherson observed that the appeal did not raise any question as to what the fair and equitable rent was, but it did raise questions as to a matter which must be decided before the Settlement Officer could settle the amount of rent payable, namely, the area of the land in respect of which the landlord was entitled to have the rent assessed. This view was followed in the cases of *Rajkumar Pratap Sahay v. Ram Lal Singh* (2), *Akbar Ali Mian v. Mussamat Hira Bibi* (3), *Lakhi Narain v. Sri Ram* (4) and *Paltoo Panday v. Sri Newas Prosad* (5). The same principle underlies the decision of the Full Bench in *Pirthi Chand Lal Choudhury v. Basarat Ali* (6), where the Courts below had decided a question falling within the scope of clause (c) of section 105A, namely, a question as to the status of the tenant.

It has been argued, however, that a different view was taken in *Shewbarat Koer v. Nirvrit Roy* (7), *Lila Kirut Narain v. Palukdhari Panday* (8), *Rameswar Singh v. Bhooneswar Jha* (9) and *W. M. Grant*

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| (1) (1897) 1 L.R. 25 Calc. 34. | (5) (1913) 18 C.W.N. 165 |
| (2) (1907) 5 C.L.J. 539. | (6) (1909) 1 L.R. 37 Calc. 30 |
| (3) (1912) 16 C.L.J. 182 | (7) (1889) 1 L.R. 16 Calc. 596. |
| (4) (1911) 15 C.W.N. 920, 921. | (8) (1889) 1 L.R. 17 Calc. 326, 328 |
| (9) (1906) 4 C.L.J. 138. | |

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v. *Ram Rekha Bhagat* (1). In my opinion, this contention is based upon an erroneous interpretation of the decisions mentioned. The case of *Shewbarat Koer v. Nirpat Roy* (2) plainly indicates that the question raised there related to the rent settled and not to matters now included in section 105A. This is emphasised in *Lala Kirut Narain v. Palakdhari Panday* (3), where Mr. Justice Ghose expressly stated that no question arose before him as to the particulars entered in the record of rights; in fact, the question related exclusively to what was the fair and equitable rent. This, so far as I can gather, was also the view adopted in *Rameswar Singh v. Bhooneswar Jha* (4), and *W. M. Grant v. Ram Rekha Bhagat* (1). I feel no doubt, accordingly, that the question propounded for the decision of the Full Bench should be answered in the negative.

As regards the merits, it has been argued that Chapter XLII of the Civil Procedure Code of 1882, mentioned in sub-section (3) of section 109A, which has now been replaced by section 100 of the Civil Procedure Code of 1908, effectively bars the present appeal. Sub-section (3) of section 109A merely provides that if the appeal is otherwise competent, it is to be heard as an appeal from appellate decree, subject to the rules laid down in that behalf in the Civil Procedure Code; in other words, this Court can interfere in an appeal of this description, only if the decision of the lower Appellate Court involves an error of law. In this connection, our attention had been drawn to a passage in the judgment of the Special Judge where he states that the tenant was not in occupation of any excess land. At first sight, this may bear the appearance of

(1) (1910) 11 C. L. J. 110

(3) (1880) 1 L. R. 17 Cal. 326, 329

(2) (1889) 1 L. R. 16 Cal. 596.

(4) (1906) 4 C. L. J. 138

a finding of fact not successfully assailable in second appeal. But, upon closer examination, it appears that the finding involves an error of law. The Special Judge has held in substance that the tenant is not in occupation of excess land, because he must be deemed under his contract to be in occupation of the area mentioned therein. This overlooks the fundamental point that the contract itself provides that the landlord will be at liberty to re-measure the lands. The lands have been actually re-measured in the settlement proceedings under Chapter X of the Bengal Tenancy Act, and the landlord claims assessment of fair rent on the area so determined by the revenue authorities, which must, *prima facie*, be deemed correct under section 103B. The tenant defendant might possibly, either by the institution of a suit under section 106 or by way of objection in this very proceeding, have established that the entry in the record-of-rights was erroneous, but he has not done so. Consequently, the landlord was entitled to have fair rent assessed on the basis of the area as found by the Settlement Officer, and this was the view accepted by him.

In my opinion, this appeal must be allowed, the decree of the Special Judge reversed and that of the Settlement Officer restored with costs throughout.

HOLMWOOD J. I agree with the judgment delivered by the learned Chief Justice that in the case before us a second appeal does lie under section 109A. I am of opinion that each case must depend on its own circumstances and that no general rule can be laid down as to what is or what is not a decision 'merely settling a rent'. But it is clear that whatever is found in any case to go beyond that simple decision and to decide any of the particulars referred to in section 105A or

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section 106 of the Bengal Tenancy Act is open to second appeal. I also agree with my learned brother Mookerjee that there is no real conflict in the decisions that have been cited before us on either side.

I, therefore, agree that the appeal should be allowed and the judgment and decree of the Settlement Officer restored with costs.

D. CHATTERJEE J. I agree in answering the question referred to us in the negative. I think the proviso to section 109A supplies an important clue to the explanation of the bar to second appeals imposed in clause (3) of the section. This proviso is to the effect that if in a second appeal the High Court alters the decision of the Special Judge in respect of any of the particulars with reference to which the rent of any tenure or holding has been settled, the Court may settle a new rent for the tenure or holding, etc. This, therefore, contemplates the case of appeals to the High Court lying in cases in which rents have been settled, not against the order settling the rent but against the decision of the Court upon the particulars in respect of which the order settling the rent has been passed. In view of this distinction made by the section itself, the controversy that appeals against orders resulting in the settlement of rent are barred does not seem to be sound.

Then with regard to the merits of the case, it has been contended that there is a finding of fact, which will prevent our interference in second appeal. That finding of fact is that the tenant is not in possession of excess lands. This, to my mind, upon the facts of this case, is an apparent finding of fact but based upon an erroneous view of the legal rights of the parties as determined by the contract entered into by them and is therefore liable to examination in second appeal.

G. S.

Appeal allowed.

APPELLATE CIVIL.

Before Mookerjee and Neibould JJ.

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Probate—Succession duty—Court Fees Act (VII of 1870) s. 19 (c) as amended by Act XIII of 1875, s. 19 (r)—Death of the first executrix—Application for second probate—Duty payable, if any, on second probate

When an executor, to whom probate has been granted, dies leaving a part of the testator's estate unadministered, and a new representative is appointed for the purpose of completing the administration, there being no new succession and no new devolution of the estate, no fresh succession-duty should be levied.

What the Legislature appears to have intended is that where the full fee, chargeable under the Court Fees Act on a probate, at the time it is granted, has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate.

* *In the goods of Chalmers (1), In the goods of Gasper (2), In the goods of Innes (3), In the goods of Balthazar (4), In the goods of Ameerun (5), Webster v. Spencer (6), Cummins v. Cummins (7), In the goods of Bell (8), Anon (9) Anon (10) and Watkins v. Brent (11) referred to.*

APPEAL by Swarnamayee Debi (petitioner)

The facts are shortly these. One Prasanna Kumar Bhattacharya died on the 28th of October 1908. On the 24th of March 1907, he had made a testamentary

*Appeal from Order, No. 110 of 1915, against the order of J. D. Cargill, District Judge of Mymensingh dated Jan. 18, 1915.

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| (1) (1870) 21 W. R. 246 n. | (6) (1820) 3 B & Ad 360. |
| (2) (1878) 1 L. R. 3 Calc. 733 | (7) (1845) 3 Jo. & Lat 64 |
| (3) (1871) 16 W. R. 253 | (8) (1871) L. R. 2 P & D 247. |
| (4) (1908) L. B. R. 255. | (9) (1875) 1 Freeman 313 |
| (5) (1871) 15 W. R. 496 | (10) (1875) 1 Ch. Cas. 265 |
| (11) (1835) 1 Myl & Cr 104 | |

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disposition of his properties whereby he appointed two successive executrices: his eldest sister Gobinda Sundari Debi and in case of her death, his widow Swarnamayee Debi.

On the 29th of April 1909, probate was granted to Gobinda Sundari Debi: after her death fresh probate was applied for by Swarnamayee Debi, on the 9th of September 1914.

On the occasion of the first probate, the assets were valued at Rs. 77,006 and, according to the scale then obtaining, Rs. 1,541 was paid by Gobinda Sundari. But since the grant of the first probate the scale of probate duty on estates valued at above Rs. 55,000 had been raised from 2 to 3 per cent. by Act III of 1910, and as duty had been paid at the rate of 2 per cent. the petitioner was called upon to pay the difference between the duties calculated at 2 per cent. and 3 per cent. respectively. The petitioner contended that no further duty was payable, but the District Judge refused to issue probate to the petitioner until the difference was paid. Hence this appeal to this Court.

Babu Dvarka Nath Chakravarti and Babu Kali Kinkar Chakravarti, for the appellant.

The Senior Government Pleader (*Babu Ram Chiranj Mitra*), for the respondent.

MOOKERJEE AND NEWBOULD JJ. This appeal is directed against an order, whereby the District Judge has in substance refused to issue a probate to the appellant till a sum of Rs. 769-3-0 had been paid as succession duty. The facts are not in controversy, and may be briefly recited. One Prasanna Kumar Bhattacharyya died on the 28th October 1908. He had previously made a testamentary disposition of his properties on the 24th March 1907. The will provided

that during the minority of his son, Amulya Kumar Bhattacharyya, his estate would be administered, first by his eldest sister, Gobinda Sundari Debi, and, next, upon her death, by his widow Swarnamayee Debi; the ladies were thus constituted the two successive executrices. On the 29th April, 1909, probate was granted to Gobinda Sundari Debi under section 31 of the Probate and Administration Act, 1881, though it was not explicitly stated that the grant was made *durante minoris aetate*. The executrix died on the 17th July 1914. As the sole residuary legatee had not yet attained his majority, the second executrix named in the will applied for probate on the 9th September, 1914. An order was recorded on that date that no probate duty appeared necessary as it had been paid already, and the case was fixed for disposal on the 7th November 1914. On that date the Court directed that the original probate produced by the applicant be cancelled and that a fresh probate with a copy of the will annexed be granted to the petitioner. On the 21st December 1914, the Court reconsidered the matter and held that as the scale of probate duty on estates valued at above Rs. 50,000 had been raised from 2 to 3 per cent. by Act VII of 1910 and as duty had been paid at the rate of 2 per cent. on the first probate, the petitioner should be called upon to pay the difference between the duties calculated at 2 per cent. and 3 per cent. respectively. The petitioner was heard on the 18th January 1915, and contended that under section 19C of the Court Fees Act, 1870, as amended by Act XIII of 1875, no further duty was payable. This contention was overruled and she was called upon to pay the additional sum named before the probate could be issued to her. The petitioner has appealed to this Court and has also obtained a Rule in the alternative, should a question be raised as to the

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competency of the appeal. It is plain that the order, in effect, refuses the application for probate and is appealable under section 86 of the Probate and Administration Act.

Section 19C of the Court Fees Act, 1870, which was inserted therein by section 6 of Act XIII of 1875, is in these terms: "Whenever a grant of probate or letters of administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate." It is plain that as the fee chargeable upon a probate is required by section 19 I to be paid before the order for grant of probate is made, what constitutes "the full fee chargeable under this Act" must be determined by reference to the point of time when the grant of probate is made. We are unable to accept the contention that "the full fee chargeable under this Act" must be determined, with reference to the point of time, when the second grant is sought. We are further unable to accept the contention that the expressions- "under this Act" and "under the same Act" refer to, not the Court Fees Act but the subsequent Acts amending the Court Fees -Act; what the Legislature appears to have intended is that where the full fee chargeable under the Court Fees Act on a probate at the time it is granted has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate. If this interpretation were not accepted, and if the contention of the Government Pleader were to prevail, the anomalous result would follow that section 19C would have no application where, as in the case before

us, the scale of probate duty has been raised in the interval between the grant of the first and the second probates, and consequently, the entire probate duty on the enhanced scale would be payable without deduction of the duty previously paid. This could hardly have been the intention of the Legislature. The second paragraph of section 19C would be of no avail, as it is restricted to grants in respect of property forming part of an estate. In our opinion, the interpretation put upon the first paragraph of section 19C by the appellant is reasonable and is undoubtedly consistent with the language used. We hold accordingly that as the full fee chargeable under the Court Fees Act on the first probate granted in this case on the 29th April 1909 was paid theron, no fee is now chargeable under the Court Fees Act on the second grant. This view does not militate against the decision of Couch C. J. in *In the goods of Chalmers* (1) and of Garth C. J. in *In the goods of Gasper* (2). In the former case, the first grant had been made and a fixed duty paid thereon under the Indian Succession Act, 1865, while the second grant was made after the Court Fees Act, 1870, had come into force. In the latter case, the circumstances were similar, with this difference that section 19C had meanwhile been inserted in the Court Fees Act, but that section could not avail, as it refers expressly to cases where both the first and the second grants had been made after the Court Fees Act had come into force. Nor is any assistance derived from the decision of Norman C. J. in *In the goods of Innes* (3), which merely recognises the principle subsequently embodied in the second paragraph of section 19C. We may add that the view adopted by us places the law in this country in a line with what has

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long been the law in England. There, all second and subsequent grants of probate and administration, in respect of property on which the full duty has been already paid upon a previous grant, are exempted from further stamp duty by section 3 of 41 Geo. III, c. 86; section 36 of 5 and 6 Vict. ch. 82 contains a corresponding provision for Ireland. It may further be observed that if the question be considered as one of principle, the rule as formulated in England and as interpreted by us is evidently just. When an executor, to whom probate has been granted dies, leaving a part of the testator's estate unadministered and a new representative is appointed for the purpose of completing the administration, there is no new succession, no new devolution of the estate, and it is difficult to appreciate why fresh succession duty should be levied. A good illustration is afforded by the case of *In the goods of Balthazar* (1); there, letters of administration had previously been issued in respect of the whole property, and the full fee chargeable on the property at the value then placed upon it had been levied. It was ruled that when a new grant had to be made under section 229 of the Indian Succession Act on the death of the first administrator, no further court-fee was leviable, although the value of the property had increased in the meantime. This is consistent with the decision of Norman C. J. in *In the goods of Ameerun* (2), that no duty is payable on a double probate which recites and in fact proceeds upon the first. Reference may in this connection be made to the following passage from Williams on Executors, 10th Ed, Vol. I, p. 295: "Probate granted to one of several executors enries to the benefit of all: *Webster v. Spencer* (3), *Cummins v. Cummins* (4). Where there are several

(1) (1904) 4 L. B. R. 255

(3) (1820) 3 B. & Ald. 360

(2) (1871) 15 W.R. 496.

(4) (1845) 3 Jo. & Lat. 64.

executors, upon the grant of probate to one of them, it is usual to reserve power of making a like grant to the others. But this appears to be unnecessary, both because the probate already granted enures to their benefit, and because they have a right to the grant, whether the power be reserved or not. The practice is to take out what is called a double probate which is in this manner. The first executor that comes in, takes probate in the usual form, with reservation to the rest. Afterwards if another comes in, he also is to be sworn in the usual manner and an engrossment of the original will is to be annexed to such probate in the same manner as the first, and in the second grant such first grant is to be recited; and so on, if there are more that come in afterwards: *4 Burn Ec. Law 310*; *In the goods of Bell* (1). If there be several executors appointed with distinct powers, as one for one part of the estate, and another for another, yet there being but one will to be proved, one proving of it suffices *Bacon's Abr. Tit. Exec. (c) 4*. So, if B is made executor for ten years and afterwards C is to be executor, and B proves the will and the ten years expire, C may administer without any further probate. *Anon* (2), *Anon* (3), *Watkins v. Brent* (4)." In our own opinion, we cannot reasonably hold that the appellant is bound to pay additional probate duty.

The result is that this appeal is allowed, and the order of the District Judge, dated the 18th January 1915, set aside. Probate will be granted to the appellant without payment of fresh probate duty. The Rule will stand discharged.

S. K. B

App al allowed

(1) (1871) L. R. 2 P. & D. 247.

(3) (1675) 1 Ch. Cas. 26.

(2) (1675) 1 Freeman 313.

(4) (1815) 1 Myl & C. 104.

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APPELLATE CIVIL.*Before Mookerjee and Newbold JJ.*

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Aug. 17.**GOPESHWAR SAHA***v.***JADAV CHANDRA CHANDA.***

Interest—Power of Court to grant relief, where interest unconscionable—Creditor, when his improper act or omission delays payment of debt.

Where delay in the payment of the principal debt is caused by some improper act or omission of the creditor, the accrual of interest will be suspended during such period as the debtor is so prevented.

Edwards v. Warden (1), *Merry v. Ryves* (2), *Marlborough v. Strong* (3), *Cameron v. Smith* (4), *Bawn v. Dalzel* (5), *Anderson v. Arrowsmith* (6), *Laing v. Stone* (7), *London, Chatham and Dover Railway Company v. South-Eastern Railway* (8) and *Webster v. British Empire Mutual Life Assurance Co.* (9) referred to.

A Court is competent to grant relief where the rate of interest appears to the Court to be of a penal character, that is, so unconscionable and extravagant that no Court should allow it.

Khagaram Das v. Ramsankar Das (10), *Abdul Majeel v. Kishore Chandra Pal* (11), *Bouicang v. Banga Behari Sen* (12) referred to.

SECOND APPEAL by Gopeshwar Saha, the plaintiff.

These appeals arise out of a suit to enforce two simple mortgage bonds. The defendant No. 1, Jadab

* Appeal from Appellate Decrees, Nos. 2971 and 3479 of 1913, against the decree of M. C. Ghose, Additional District Judge of Mymensingh, dated June 16, 1913, confirming the decree of Sarat Kishore Boro, Subordinate Judge of Mymensingh, dated Feb. 17, 1913.

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| (1) (1876) 1 App. Cas. 281. | (7) (1828) 2 Man. & Ry. 561 ;
Moo. & M. 229. |
| (2) (1857) 1 Elen L. | |
| (3) (1723) 4 Brown P. C. 539. | (8) [1891] 1 Ch. 120. |
| (4) (1819) 2 B. & A.M. 305. | (9) (1880) 15 Ch. D. 163. |
| (5) (1828) Moo. & M. 228. | (10) (1914) I. L. R. 42 Calc. 652 |
| (6) (1839) 2 P. & D. 103. | (11) (1914) I. L. R. 42 Calc. 690. |
| (12) (1915) 22 C. L. J. 311 ; 20 C. W. N. 108. | |

Roy, executed these bonds in Sraban 1305 in favour of the defendants Nos. 4 and 5, Jadav Saha and his brother, who afterwards for a consideration sold their rights under the bonds to plaintiff, Gopeshwar Saha. The plaintiff brought a suit on the 13th of September 1911 against the executant defendant No. 1 and Dino Nath Biswas defendant No. 2 to whom defendant No. 1 had transferred the properties under the bonds and against certain others. Various issues were raised; but the most important were these—

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(i) Is the plaintiff in any way barred by his own acts and conduct from enforcing any part of his claim for interest?

(ii) Was the bargain of defendants Nos. 4 and 5 with defendant No. 1 in any way unconscionable? If so, can plaintiff enforce his claim on the bonds?

(iii) Is the suit bad for defect of parties?

Issue No. (i) was decided by the first Court against the plaintiff and the facts found were that the plaintiff, a rich and powerful man of the locality, had complete influence over defendant No. 1 who was a needy man, much in debt and had used the influence unscrupulously to the material injury of the defendant No. 1. It is said that the plaintiff gave out hopes to the defendant No. 1 that he could purchase all but four of defendant No. 1's properties and could with the consideration clear off all his debts; that upon this understanding he induced defendant No. 1 to execute a mortgage bond for Rs. 1,373 which sum he would use in clearing up debts which pressed upon defendant No. 1, but the plaintiff did not carry out his promise and that the defendant did not receive any consideration at all for that bond; that, therefore, the defendant No. 1, in distress, turned to defendant No. 2, who is a pleader and money-lender of the locality, and in Sraban 1315 contracted to sell his properties to him. In Kartik

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1315, defendant No. 1 was proceeding to the Registration office to register the contract deed in favour of defendant No. 2, but the plaintiff had him called away from the way and persuaded him not to register the deed telling him that he would himself buy the properties and satisfy all his debts. The defendant No. 1 was thereafter under complete control of the plaintiff who, it is said, assisted defendant No. 1 in resisting a registration notice which a peon went to serve on behalf of defendant No. 2. Both defendant No. 1 and plaintiff were convicted by a Magistrate, but they were subsequently acquitted by the High Court. The defendant No. 2 brought a suit to enforce the registration of the contract deed; but the plaintiff with men and money helped defendant No. 1 in that suit but in vain. Defendant No. 2 won the suit.

Then the plaintiff gave up defendant No. 1 and declined to buy the properties. The defendant No. 1 had to go back to defendant No. 2 and make up with him and it was only on the 30th Bhadra 1318 that he could sell his properties to defendant No. 2. Upon these facts the lower Court held that the plaintiff caused material injury to defendant No. 1 and has, on the ground of equity, disallowed interests on the bonds from the middle of Kartik 1315 to Bhadra 30th 1318. The lower Appellate Court upheld the decision of the Subordinate Judge on this point. As regards the second issue, the Courts decided against the defendants holding that there was nothing at all to prove undue influence, except the fact that the defendant No. 1 was in debt and that defendant No. 4 was his creditor. The third issue also was decided against the defendants.

Both the parties appealed to the High Court.

Babu Dwarka Nath Chuckerbury (with him

Babu Provash Chandra Mitra and *Babu Suresh Chandra Bose*), for the plaintiff, submitted that no wrong was done by the plaintiff to defendant No. 1. If a man tries to injure another, and in so doing, injures himself, is he entitled to any consideration? Assuming that I tried to help the defendant No. 1 to the detriment of another, how does that entitle the defendant No. 1 to make a complaint against me? Where is the equity? No such defence as this is known to law. There is no ground for the suspension of interest.

Babu Biraj Mohan Majumdar, for the defendants, contended that it was the conduct of the plaintiff which prevented the defendant No. 1 from carrying out the transaction which he had arranged with defendant No. 2. Defendant No. 1 was completely under the control of the plaintiff. Both the Courts have disallowed interest from the middle of Kartik 1315 to Bhadra 30th 1318, and rightly so, since, during that period, the debtor was prevented by the improper act of the creditor from repaying the loan, as he would undoubtedly have done, by selling off the mortgaged properties. It was further submitted that the rate of interest was penal and as such the Court should grant relief.

Babu Dwarka Nath Chuckerbury, in reply.

Cur. adv. vult.

MOOKERJEE AND NEWBOULD JJ. These appeals are directed against the decree in a suit to enforce two mortgage bonds assigned by the original mortgagee to the plaintiff. The bonds were executed on the 25th July 1898 and were assigned to the plaintiff on the 16th July 1906. The principal sums secured by the bonds were Rs. 525 and Rs. 375, respectively, which carried interest at the rate of 15 $\frac{1}{2}$ percent. per year with triennial rests. The plaintiff commenced this

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action on the 13th September 1911 for recovery of Rs. 4,979-9 annas, namely, Rs. 900 as principal and Rs. 4,079-9 annas as interest thereon. He joined as principal defendants the mortgagor as also the purchaser of the equity of redemption, in whose favour the transfer was completed on the 16th September 1911. The substantial question in controversy relates to the amount of interest justly recoverable by the plaintiff. The defendants contended, *first*, that the rate of interest was penal and, *secondly*, that the interest was suspended from the 1st November 1908 to the 16th September 1911, as during that period the debtor was prevented by the improper act of the creditor from repaying the loan, as he would otherwise have done, by the sale of the mortgaged properties. The Subordinate Judge overruled the first contention, but gave effect to the second objection and made the usual mortgage decree for a portion of the amount claimed. The plaintiff, as also the defendants, appealed to the District Judge against this decision. The District Judge has confirmed the decree of the trial Judge and has dismissed both the appeals. Against this decree of the District Judge, the plaintiff and the defendants have presented separate appeals to this Court. The plaintiff has contended that interest should have been allowed for the entire period from the date of the mortgages to the date fixed in the decree for redemption. The defendants have argued that the contract rate of interest was extravagantly high and unconscionable, and that interest should consequently have been decreed only at a reduced rate.

As regards the appeal by the plaintiff, there can be no doubt that where delay in the payment of the principal debt is caused by some improper act or omission of the creditor, the general rule is that the accrual of

interest will be regarded as suspended during such period. In the case before us, the facts concurrently found by the Courts below may be briefly recited. The mortgagor, hard pressed by the high rate of interest on the loan, found himself in a helpless condition, and on the 6th August 1908 entered into a written agreement with the second defendant to sell the mortgaged property to him with a view to satisfy the mortgage debt from the sale-proceeds. The plaintiff, the assignee of the mortgage bonds, was himself anxious to purchase the property; so he forthwith intervened and urged the mortgagor to break his contract with the intending purchaser. The mortgagor was reluctant to resile from his agreement and explained to the plaintiff the obvious danger of the course proposed by him, as the contract was complete and enforceable. The plaintiff, however, successfully dissuaded the mortgagor from the contemplated sale. The result was a suit by the intending purchaser against the mortgagor for specific performance of the contract. The plaintiff did his best to defend the suit in the name of the mortgagor, but he was ultimately thwarted, as the suit was decreed. The mortgagor was accordingly obliged to complete the sale in favour of the purchaser, which he did on the 16th September 1911. The plaintiff, thus foiled in his design to seize the mortgaged property, sued to enforce the securities he held. The question arises, whether, in the circumstances stated, the accrual of interest should not, in justice, be deemed to have been suspended during the period when, but for the improper intervention of the plaintiff, the mortgagor might have completed the sale of the mortgaged property and repaid the loan from the sale-proceeds. The Courts below have concurrently answered this question against the plaintiff. The principle that if the failure to make payment of the principal debt is

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due to an improper act of the creditor or to such conduct on his part as prevents the debtor from repaying the loan, interest on such debt stands suspended during the time the debtor is so prevented, is of extensive application. The Courts have taken recourse in various reported decisions, both in England and in the United States, to this principle to attain the ends of justice. No useful purpose would be served by an analysis of the varying circumstances of the different cases, but reference may be made to the decisions in *Edwards v. Warden* (1), *Merry v. Ryves* (2), *Marlborough v. Strong* (3), *Cameron v. Smith* (4), *Bann v. Daleel* (5), *Anderton v. Arrowsmith* (6), *Laing v. Stone* (7), *London Ry. Co. v. South Eastern Ry. Co.* (8), *Webster v. British Empire* (9), *Hayes v. Elmsley* (10), *Stevenson v. Davis* (11), *Bowman v. Wilson* (12), *Pinkard v. Ingersoll* (13), *Union Insurance Co. v. Chicago Ry. Co.* (14), *Southern W. L. Co. v. Haas* (15), *Watson v. McManus* (16), *Morsford v. Ambrose* (17), *Hart v. Brand* (18), *Suffolk Bank v. Worcester Bank* (19), *Steven v. Baringar* (20), *Reid v. Russelauer* (21), *Plotner v. Warehouse* (22). It is obviously just that if a creditor, by his own act, puts it out of the power of the debtor to make payment.

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| (1) (1876) 1 App. Cas. 281. | (12) (1881) 2 MacCrory (U. S.) 294. |
| (2) (1757) 1 Eden. 1. | (13) (1847) 12 Alibani 441. |
| (3) (1723) 4 Brown P. C. 539. | (14) (1893) 146 Ill. 320. |
| (4) (1819) 2 B. & Ald. 305. | (15) (1888) 76 Iowa 432. |
| (5) (1829) Moo. & M. 228. | (16) (1909) 223 Pa 583. |
| (6) (1839) 2 P. & D. 408. | (17) (1830) 3 J.J. Marshall Ry. 633. |
| (7) (1823) 2 Man. & Ry. 561 ;
Moo. & M. 229. | (18) (1818) 1 A. K. Marshall 159 ;
10 Am. Dec. 715 |
| (8) [1892] 1 Ch. 120. | (19) (1827) 5 Pickering (Mass.) 106. |
| (9) (1880) 15 Ch. D. 169. | (20) (1835) 13 Wendell N. Y. 633. |
| (10) (1893) 23 Can. Sup. Ct. 623. | (21) (1824) 3 Cowan N. Y. 393 ;
5 Cowan 587. |
| (11) (1893) 23 Can. Sup. Ct. 629. | |
| | (22) (1909) 122 S. W. 443. |

no interest should be recoverable for the period during which the debtor was thus prevented from paying the creditor; the wrong was with him and he cannot charge the effect to the other. This doctrine is based on the plainest grounds of justice, equity and good conscience and has been rightly applied by the Courts below for the protection of the defendants.

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As regards the appeal by the defendants, the decisions of this Court in *Khagaram Das v. Ramsankar Das* (1), *Abdul Majeed v. Kkirode Chandra Pal* (2), and *Bouwang v. Banga Behari Sen* (3), show that a Court is competent to grant relief whenever the rate of interest appears to the Court to be of a penal character, that is, so unconscionable and extravagant that no Court shall allow it. We are not prepared to hold that the present case falls within that rule. The amount claimed as interest, if distributed over the entire period, works out at the rate of 35 per cent. per annum simple interest, while the amount actually decreed by the Courts below works out at the rate of 22 per cent. per annum simple interest. We cannot say that this rate is so excessive as to justify our interference.

The result is that both the appeals are dismissed and the decree of the District Judge is affirmed.

S. K. B.

Appeals dismissed.

(1) (1914) 1 L. R. 42 Calc. 652; (2) (1914) 1 L. R. 42 Calc. 690.

21 C.L.J. 79; 19 C.W.N. 775 (3) (1915) 22 C. L. J. 311,

20 C. W. N. 493

APPELLATE CIVIL.

Before Holmewood and Neibould JJ.

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Aug. 23.

NRIPENDRA NATH SAHU

v.

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AND

GOPINATH MANDAL

v.

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*Fraudulent Preference—State of mind of maker—Intention—Peculiar
Onus—Provincial Insolvency Act (III of 1907) s. 37.*

The question whether there has been a fraudulent preference depends not upon the mere fact that there had been a preference but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor but that he has fraudulently done so. It depends upon what was in his mind. For this purpose it is not true that the debtor must be taken to have intended the natural consequences of his acts. One must find out what he really did intend.

Dicla of Lord Halsbury in Sharp v. Jackson (1) followed.

It is not necessary to threaten criminal proceedings to constitute pressure. The threat of civil suits is enough. If it is established that the transaction was the result of real pressure brought to bear by a creditor on his debtor, it cannot be deemed as a spontaneous act.

The onus is on the Receiver to show that it was an outcome of a fraudulent preference.

APPEAL (No. 3 of 15) by Nripendra Nath Sahu, creditor, petitioner.

Appeal (No. 6 of 1915) by Gopinath Mandal, creditor, petitioner.

* Appeals from Original Orders, Nos. 3 and 6 of 1915, against the order of H. P. Duval, Additional District Judge of 24-Parganas dated Dec 8, 1914.

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In these matters Babu Ashutosh Ghose, Receiver in bankruptcy to the estate of Nilratan Mandal and others, who had been declared insolvent, sought to set aside three mortgage deeds on the ground that they were void as against him under section 37 of the Provincial Insolvency Act. A petition for insolvency was filed against Nilratan Mandal and his brothers by a creditor on 19th February 1912. On 4th December 1911, the brothers had executed a mortgage for Rs. 9,000 of some of their immoveable properties in favour of Nripendra Nath Sahu, and on 27th December 1911 and 14th February 1912 they executed two other mortgages, one for Rs. 6,000 and another for Rs. 10,000, in favour of Gopinath Mandal. The first mortgage was registered on the 13th February 1912, and the two others on 18th February 1912. In respect of both these creditors the mortgages were given as security for money borrowed before on hand-notes. After recording evidence the District Judge of 24-Parganas, on 30th January 1913, declared all these transactions void as against the Receiver under section 37 of the Act. The mortgagees thereupon appealed to the High Court which remanded the case directing the District Judge to take further evidence and decide the question according to the following principles—(i) That the debtor at the date of the transaction must be unable to pay from his own money his debts as they fall due. (ii) The transaction must be in favour of a creditor or of some persons in trust for a creditor. (iii) The debtor must have acted with a view to give such creditor a preference over his other creditors. (iv) The debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached. The Additional District Judge of Alipore, by his judgment dated 8th December 1914, again set aside these

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as against the Receiver. Nripendra Sahu and Gopinath Mandal then preferred the present two appeals to the High Court.

Mr. Caspersz, Babu Jnanendranath Sarkar and Babu Bhupendra Nath Bose, for the appellant in A. O. D. No. 3 of 1915.

Sir Rashbehary Ghose and Babu Panchanan Ghose, for the appellant in A. O. D. No. 6 of 1915.

Babu Umakali Mukherji, Babu Bipin Behari Ghose and Babu Khetra Gopal Banerjee, for the respondent in both appeals.

Cur. adv. vult.

HOLMWOOD AND NEWBOULD JJ. These two appeals arise from an order made on remand by the learned Additional District Judge of the 24-Parganas in an insolvency matter. It appears that Babu Ashutosh Ghose, the Receiver in bankruptcy to the estate of Nilratan Mandal and others, sought to set aside three mortgage deeds on the ground that they were void against him under section 37 of the Provincial Insolvency Act. The insolvency proceedings were started by one Kissen Chand Kesori Chand, a creditor of Nilratan Mandal, for Rs. 2,500 at the instigation, it is said, of Mr. Palit, a second creditor, for Rs. 45,000 odd who had advanced Rs. 5,000 to Gopinath Mandal, the appellant in appeal No. 6, to give to Nilratan his brother-in-law on a note of hand dated the 1st March 1911. It further appears that Gopinath had advanced Rs. 12,000 on a note of hand dated the 17th June 1911 and Rs. 2,000 on a note of hand dated the 1st December 1911, both of which sums he had borrowed from Dr. Satya Charan Mookerjee, the next heaviest secured creditor of Nilratan.

In appeal No. 3 the appellant Nripendra Nath Sahu, a distant connection of the insolvent, had

advanced four sums on hand-notes in July 1911, namely, Rs. 2,500 on the 11th July, Rs. 2,500 on the 20th July, Rs. 2,000 on the 21st July and Rs. 2,000 on the 26th July, making a total of Rs. 9,000. A stamp paper was purchased on July 26th, the date of the last transaction, for Rs. 15 for the purpose, it is alleged, of engrossing a mortgage security for this Rs. 9,000. Interest was to run on the hand-notes at the rate of 12 per cent. per annum. On the 4th December 1911, a mortgage deed for this Rs. 9,000 was executed by Nilratan and his four brothers, one of them a minor under his guardianship, in favour of Nripendra Nath Sahu. This was a second mortgage of the property already mortgaged to Nripendra's father, Upendra Nath Sahu, who had had continuous transactions with Nilratan's firm for years.

On the 27th December Nilratan executed a mortgage deed for Rs. 6,000 in favour of Gopi Nath. It is stated in the evidence to have been on account of the hand-note for Rs. 5,000 above referred to after making accounts. It is further stated that Rs. 3,000 was paid in cash to Gopi Nath in the beginning of February and that the balance Rs. 10,000 formed the subject of another mortgage on the 14th February 1912. The mortgage for Rs. 6,000 was the third mortgage of the land already mortgaged to Nripendra and Upendra. The mortgage for Rs. 10,000 was the second mortgage of the lands already mortgaged to Mr. Palit for Rs. 45,000 odd.

Now, the only question that arose in this litigation was whether these three mortgage-bonds fell within the meaning of section 37 of the Provincial Insolvency Act. At the first hearing, the learned Additional Judge held that they did. On appeal, Mr. Justice Mookerjee and Mr. Justice Beachcroft remanded the case setting out clearly the law on the subject for the Judge's guidance and formulating four conditions as essential

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to bring a transfer of the insolvent's property within the section. As to two of these, namely, the 2nd and the 4th that the transaction must be in favour of some creditor and that the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached, there was never any doubt. The two points the learned Judge had to consider in the light of the judgment of this Court in remand were whether the debtor at the date of the transaction was unable to pay from his own money his debts as they fell due, and, secondly, whether the debtor had acted with a view to give any creditor a preference over his other creditors so as to render the transaction fraudulent and void as against the receiver. Now, the Receiver in his oral evidence says that he found the liabilities to be Rs. 1,92,576, from an inspection of the books, on the 4th December 1912, while he gives an account of the assets which is not very intelligible without a reference to the accounts themselves. From these we find that the landed property was sold for Rs. 1,30,950, besides Rs. 10,257 which had to be paid in by the minor brother on partition as balance of his excess share. This makes Rs. 1,41,207. The stock-in-trade was Rs. 13,499-1, the cash balance Rs. 767-14 and the book debts Rs. 37,056-10-6. This makes a total of Rs. 1,92,530-9-8 or within Rs. 46 of the liability as alleged by the Receiver. But the appellants have given us a total liability of Rs. 1,80,000 by detailed figures from the books. And the Receiver, on whom the onus lay, has not taken the trouble to show what debts had actually fallen due on the 4th December and the order in which they fell due. The words "as they become due" in the section seem to have been ignored both by the Receiver and by the lower Court. It is true, he says they only borrowed Rs. 15,000 on *hundis* after

the 18th of Agrahayan that fell due after the last mortgage on the 14th February 1912. But the accounts show a large outstanding of *hundis* of much earlier dates and there is nothing to show when they fell due.

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Be that as it may, although it is clear that the insolvent had not money in his hands sufficient to meet the liability on the 4th December 1911 having only Rs. 767-14 in cash, and, on the authority of *In re Washington Diamond Mining Co.* (1), the fact that the debtor has money locked up which may be available at a later period for the payment of debts, cannot be considered for the purpose of excluding the debtor from falling within the category of bankrupt; "yet," says Vaughan Williams J., "when you come to deal with the question whether the payment was made with the view of giving the creditors a preference it is quite obvious that one cannot for that purpose leave out of consideration the fact, if it was a fact, that the directors might well anticipate that they would be able to get in moneys of the Company in sufficient time to render it extremely improbable that they would be driven to a liquidation of the Company's affairs by a winding up; because it is much less likely that the directors would seek to give a preference to creditors in such a case than it would be in a case where the condition of the Company was such that it must have been plain to the directors themselves that a stoppage of payment or winding-up was inevitable." It has been pointed out to us that the decision of Vaughan Williams J., which was in that case that there was no fraudulent preference, was upset in the Court of Appeal on the ground that a Company stands in a different position to an individual, who has since become bankrupt, by reason of the Companies Act, 1862, and it was found as a fact that the directors were

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to bring a transfer of the insolvent's property within the section. As to two of these, namely, the 2nd and the 4th that the transaction must be in favour of some creditor and that the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached, there was never any doubt. The two points the learned Judge had to consider in the light of the judgment of this Court in remand were whether the debtor at the date of the transaction was unable to pay from his own money his debts as they fell due, and, secondly, whether the debtor had acted with a view to give any creditor a preference over his other creditors so as to render the transaction fraudulent and void as against the receiver. Now, the Receiver in his oral evidence says that he found the liabilities to be Rs. 1,92,576, from an inspection of the books, on the 4th December 1912, while he gives an account of the assets which is not very intelligible without a reference to the accounts themselves. From these we find that the landed property was sold for Rs. 1,30,950, besides Rs. 10,257 which had to be paid in by the minor brother on partition as balance of his excess share. This makes Rs. 1,41,207. The stock-in-trade was Rs. 13,499-1, the cash balance Rs. 767-14 and the book debts Rs. 37,056-10-6. This makes a total of Rs. 1,92,530-9-8 or within Rs. 46 of the liability as alleged by the Receiver. But the appellants have given us a total liability of Rs. 1,80,000 by detailed figures from the books. And the Receiver, on whom the onus lay, has not taken the trouble to show what debts had actually fallen due on the 4th December and the order in which they fell due. The words "as they become due" in the section seem to have been ignored both by the Receiver and by the lower Court. It is true, he says they only borrowed Rs. 15,000 on *hundis* after

the 18th of Agrahayan that fell due after the last mortgage on the 14th February 1912. But the accounts show a large outstanding of *hundis* of much earlier dates and there is nothing to show when they fell due.

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Be that as it may, although it is clear that the insolvent had not money in his hands sufficient to meet the liability on the 4th December 1911 having only Rs. 767-14 in cash, and, on the authority of *In re Washington Diamond Mining Co.* (1), the fact that the debtor has money locked up which may be available at a later period for the payment of debts, cannot be considered for the purpose of excluding the debtor from falling within the category of bankrupt; "yet," says Vaughan Williams J., "when you come to deal with the question whether the payment was made with the view of giving the creditors a preference it is quite obvious that one cannot for that purpose leave out of consideration the fact, if it was a fact, that the directors might well anticipate that they would be able to get in moneys of the Company in sufficient time to render it extremely improbable that they would be driven to a liquidation of the Company's affairs by a winding up; because it is much less likely that the directors would seek to give a preference to creditors in such a case than it would be in a case where the condition of the Company was such that it must have been plain to the directors themselves that a stoppage of payment or winding-up was inevitable." It has been pointed out to us that the decision of Vaughan Williams J., which was in that case that there was no fraudulent preference, was upset in the Court of Appeal on the ground that a Company stands in a different position to an individual, who has since become bankrupt, by reason of the Companies Act, 1862, and it was found as a fact that the directors were

(1) [1893] 3 Ch. 95, 101.

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guilty of a misfeasance, but the *dictum* of Vaughan Williams J. as regards the propriety of taking into consideration the unliquidated assets of the debtor on the question of intention was not questioned. We may, therefore, find that the condition (i) was not fulfilled and need not be further adverted to. But that condition (iii), the second question before the learned Judge, and before us in appeal, depends on considerations which do not seem to have been adequately weighed by the learned Judge. As was pointed out by Lord Halsbury in *Sharp v. Jackson* (1), the first thing to be considered is the question of fact—what were the reasons why the deeds were executed? and in this connection he expressed his entire and absolute agreement with the following remarks of Lord Esher: “The question whether there has been a fraudulent preference depends not upon the mere fact that there had been a preference but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor but that he has fraudulently done so. It depends upon what was in his mind. It has been argued that the debtor must be taken to have intended the natural consequences of his acts. I do not think that this is true for this purpose. I think one must find out what he really did intend. The recitals in the deed seem to show what was really his object.” Now, applying this to the case before us, we have the fact that the assets covered, or possibly more than covered, the liabilities, that the intention was to secure debts payable on demand by the security of a mortgage which would relieve the pressure on the debtor’s ready-cash and so put him in a better position to pay his debts, as they become due, with his own money. There was no idea of insolvency

certainly up to the time of Mr. Palit's visit on the 7th February. This the learned Judge seems to have realized in a passage towards the end of his judgment. On the principles, therefore, laid down above there is nothing to bring the mortgage in appeal No. 3 or the first mortgage in appeal No. 6 within section 37 of the Act.

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If we went into the further considerations of pressure on the debtor and of previous understanding, the facts would equally compel us to find in favour of the appellants. There was pressure in the threat of civil suits. The learned Judge was mistaken in thinking that it was necessary to threaten criminal proceedings to constitute pressure. It appears, from the argument before us, to have been based on a misreading of the remarks of Jessel M. R. in *Ex parte Hall* (1). As Mookerjee J. pointed out that if it is established that the transaction was the result of real pressure brought to bear by a creditor on his debtor it cannot be deemed as a spontaneous act, and the deeds recite such pressure.

As to previous understanding, we think in appeal No. 3 the purchase of the stamp paper by the debtor on the 26th July for Rs. 45, the exact sum necessary for Rs. 9,000 mortgage, shows clearly that there was such an understanding. We think that an oral agreement to mortgage sufficient property to cover the debt, is sufficiently specific to constitute an agreement within the meaning of the English authorities cited in the judgment of this Court on remand. One of those at least was a "prior voluntary promise." There does not appear to have been any understanding in the case No. 6, though the parties were brothers-in-law, but there was pressure. In *Ex parte Lancaster in re Marsden* (2), it was held that the argument

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"you must infer that this man suffered judgment to be recovered and execution to go against him for the purpose of preferring his father-in-law" was a view for which there was no kind of support. It was not an act of bankruptcy to give in to a clamorous creditor even if he be your brother-in-law. It is not the duty of the debtor invariably to resist him. It is very much like "bounty," as it is called, by Lord Esher, when he does it for his brother-in-law. But the onus is on the Receiver to show that it was an outcome of a fraudulent preference and this, in the case of the mortgages of the 4th and the 27th December 1911, we think, he has entirely failed to discharge.

As regards the mortgage of the 14th February 1912, we cannot see that there was any preference either. Kissen Chand's debt of Rs. 2,500 did not fall due till the 17th February 1912. Mr. Palit's demand for money on the 7th February 1912 had been met by payment of Rs. 471 odd as interest. He was not entitled to anything but interest. No other creditor was pressing. Gopinath was threatening with a suit. Nilratan's idea was to save himself and not to give preference. Suspicion is not enough in these cases as was pointed out by Cotton L. J. in *Ex parte Lancaster*⁽¹⁾ cited above. The mortgage of the 4th December 1911 had been registered the day before. Gopinath wanted his deed of the 27th December to be registered and another deed to cover the balance of his dues. Both were registered on the 15th February 1912. The learned Judge seems to think that there was something suspicious in the delay in registration. On the contrary if Nilratan had suspected that the deeds of the 4th December 1911 and the 27th December 1911 would be impugned, he would have hastened to register them

But for the first time in argument by the respondents' 1915
 vakil in this Court a sinister suggestion was thrown
 out that the deeds of December were ante-dated and
 that they were all got up in February 1912 after
 Mr. Palit's visit. There is no evidence of this; and
 the case has passed through the hands of the Judge in
 the lower Court twice and of two Judges of this Court
 in appeal without such a thing being hinted at.
 Mr. Palit's visit appears from the evidence oral and
 documentary to have been to demand money and for
 nothing else. If he secretly got Kissen Chand to file
 the petition of the 19th February two days after his
 debt of Rs. 2,500 had become due, that is all the more
 reason for holding that Nilratan certainly could not
 have suspected any such act beforehand. All the
 persons who said that Nilratan had refused them
 security and said he had no money refer to a period
 beyond three months. The latest is the 18th November
 1911 and the petition is dated the 19th February
 1912. There is no reason to doubt the genuineness of
 the advances made by Nripendra and Gopinath. They
 were held genuine by this Court before remand, and
 Gopinath's are strongly corroborated by his transac-
 tions with Mr. Palit and Dr. Satya Charan Mookerjee.
 The circumstances of Nilratan are shown on the record
 to have been slightly better in February than they
 were in December. We do not think that any distinc-
 tion can be made as against the mortgage of the 14th
 February 1912.

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The result is that the appeals are decreed and the
 applications of the Receiver dismissed. The appellants
 are entitled to their costs out of the estate in each case
 throughout.

G. S.

Appeal allowed.

APPELLATE CIVIL.

Before Mookerjee and Teunon JJ.

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Sep. 6.

BHUPENDRA KUMAR CHAKRAVARTY

v.

PURNA CHANDRA BOSE.*

Jurisdiction—Court of limited pecuniary jurisdiction—Mesne profits amounting to Rs. 60,000, antecedent to suit and pendente lite, whether can be investigated by Munsif—Civil Procedure Code (Act XIV of 1882) ss. 50, 211, 212—Civil Courts Act (XII of 1887) ss. 7, cl. (1), 18.

When a plaintiff institutes his suit for possession and mesne profits antecedent to the suit in a Court of limited pecuniary jurisdiction, he may be rightly deemed to have limited his claim to the maximum amount for which that Court can entertain a suit.

In fact in such a case if the plaintiff subsequently put forward a claim in excess of the jurisdiction of the Court, he may be justly required to remit the excess because he had with his eyes open brought his suit deliberately in a Court of limited pecuniary jurisdiction.

Golap Singh v. Intra Kumar Hazra (1) followed.

Sudarshan Dass v. Rampershad (2) dissented from.

But mesne profits antecedent to the suit and mesne profits *pendente lite* stand on very different grounds.

A Munsif cannot entertain an application for investigation of mesne profits *pendente lite* when the claim was laid over Rs. 60,000.

The proper course to follow was to direct the return of the plaint in so far as it embodied a prayer for assessment of mesne profits from the institution of the suit to the date of delivery of possession, for presentation to the Court of competent pecuniary jurisdiction, i.e., the Court of the Subordinate Judge.

Rameswar Mahton v. Dilu Mahton (3) distinguished.

* Appeal from Appellate Order, No. 209 of 1910, with Rule No. 3698 of 1910, against the order of W. H. H. Vincent, District Judge of 24-Parganas, dated March 19, 1910, confirming the order of Sarada Prasad Banerjee, Munsif of Baruipur, dated Dec. 22, 1909.

(1) (1909) 13 C. W. N. 493; 9 C. L. J. 367. (2) (1910) 7 All L. J. R. 263

(3) (1894) I. L. R. 21 Calc. 550.

SECOND appeal by Bhupendra Kumar Chakravarty, the judgment-debtor.

The plaintiff in the case out of which this appeal arose, sued the defendants for possession of certain land valued at Rs. 686-8 and mesne profits and obtained a decree, the value of the mesne profits being left for decision in execution. The suit was brought in a Munsif's Court. The decree-holder then applied in that Court for ascertainment of mesne profits valuing the same at Rs. 75,510. The Munsif held he had unlimited jurisdiction to assess subsequent mesne profits, and, on appeal the learned District Judge of Alipore upheld his order. Thereupon, the judgment-debtor preferred this appeal to the High Court.

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Babu Mahendra Nath Roy and Babu Shiva Prasanna Bhatti Charjee, for the appellant.

Babu Biswanath Bose, for the respondent,
Cur. adv. ruli.

MOKKERJEE AND TEUNON JJ. This appeal is directed against an order made in course of proceedings in execution of a decree in a suit for recovery of possession of land and mesne profits. The respondent commenced his suit on the 12th April 1902 in the Court of the Munsif at Baruipur. His claim, valued at Rs. 886-8, was composed substantially of three parts, namely, *first*, for recovery of possession of about 100 bighas of land valued at Rs. 686-8 which was stated to be the price paid by him to his vendor on the 24th March 1899; *secondly*, mesne profits from the date of dispossession on the 12th April 1899 to the date of the institution of the suit, valued approximately at Rs. 200; and, *thirdly*, mesne profits from the date of institution of the suit up to the date of recovery of possession in execution of the decree to

1910 be made in the suit. No objection was taken by the defendant to the valuation of the suit, although the claim was contested upon the merits in every particular. On the 27th November 1905, the Munsif made his decree in favour of the plaintiff. This decree entitled the plaintiff to recover possession of the land. As regards the amount of mesne profits, the Munsif left them to be determined in execution. Upon appeal by the defendant, this decree was affirmed by the Subordinate Judge on the 8th February 1907. Upon appeal to this Court, the decree of the Subordinate Judge was confirmed on the 17th August 1908. Meanwhile the decree-holder had executed his decree and recovered possession of the land on the 15th July 1907. On the 9th January 1909, the decree-holder applied to the Munsif for assessment of mesne profits. In this application he claimed the mesne profits for nearly a period of ten years. The claim was laid at Rs. 3,750 per year for the first six years and Rs. 6,300 per year for the remaining four years. The aggregate claim inclusive of interest amounted to Rs. 75,510. As soon as this application was presented, the judgment-debtor objected that the Munsif had no jurisdiction to make a decree for any sum in excess of what taken with the value of the land would make up Rs. 1,000 which was the statutory limit of the pecuniary jurisdiction of the Munsif. As this difference amounted to Rs. 313-8 the judgment-debtor offered to deposit the amount in Court. The Munsif, thereupon, held that he had jurisdiction to award mesne profits for any sum that might be found due, even though it exceeded the limit of his pecuniary jurisdiction, provided that such sum was awarded on account of the mesne profits between the institution of the suit and the delivery of possession in execution of the decree. As regards mesne profits antecedent to the suit, the Munsif did

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not express any opinion as to the amount up to which he was competent to make an award. The judgment-debtor then appealed to the District Judge who has affirmed the order of the Munsif. The judgment-debtor has now appealed to this Court, and on his behalf the decision of the Court below has been assailed on the ground that the Munsif, as a Court of limited pecuniary jurisdiction, cannot make a decree more than Rs. 313-8 (the difference between Rs. 1,000 the limit of the pecuniary jurisdiction of the Munsif and Rs. 686-8 the value of the land). In support of this proposition reliance has been placed upon the decision of this Court in *Golapsingh v. Indra Kumar Hazra* (1). This position has been disputed on behalf of the decree-holder, and it has been argued that even if it could be maintained in respect of the mesne profits antecedent to the institution of the suit, it could not be supported in respect of the mesne profits *pendente lite* in view of the decision of this Court in the case of *Rameswar Mahton v. Dilu Mahton* (2). The question raised is one of some nicety and its solution must ultimately depend upon the true effect to be attributed to the provisions of the Bengal Civil Courts Act of 1887 and the Civil Procedure Code of 1882.

Section 18 of Act XII of 1887 provides that the jurisdiction of the District Judge and the Subordinate Judge shall, subject to the provisions of section 15 of the Civil Procedure Code of 1882, extend to all original suits for the time cognizable by the Civil Courts. Section 19, sub-section (1) then provides that the jurisdiction of a Munsif shall extend to all like suits of which the value does not exceed Rs. 1,000. Sub-section (2) of the same section provides that in certain

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(1) (1909) 9 C. L. J. 367;

(2) (1894) I L. R. 21 Calc. 550.

1910 cases, a Munsif may be invested with jurisdiction to try suits not exceeding in value Rs. 2,000. Section 21 then provides that appeals from any decree of the Subordinate Judge lie to the District Judge in all cases in which the value of the suit does not exceed Rs. 5,000. In cases in which the value exceed Rs. 5,000 the appeal lies to the High Court. Appeals from the decrees of the Munsif lie to the District Judge. The policy of the Legislature as indicated by these provisions is obvious. Suits of which the value exceed Rs. 1,000 or in certain instances Rs. 2,000 shall be tried by a Subordinate Judge. If the value of the suit exceed Rs. 5,000, a first appeal shall lie to this Court in which not merely questions of law but also questions of fact may be investigated.

Let us now turn to the provisions of sections 211 and 212 of the Code of Civil Procedure of 1882. The first of these authorises the Court, which has seizin of a suit for recovery of possession of immoveable property, to provide in the decree for recovery of mesne profits from the institution of the suit to the delivery of possession. The second section deals with cases in which the claim is for recovery of possession and mesne profits antecedent to the suit. The Court may either determine the amount of the decree itself or direct an enquiry and dispose of the matter on further orders. Section 244 then provides that an enquiry into the amount of mesne profits in either of these contingencies must be made by the Court executing the decree. Clause (a) deals with mesne profits antecedent to the institution of the suit, that is, refers to cases covered by section 212.—Clause (b) refers to mesne profits *pendente lite* and covers cases mentioned in section 211. Now, in so far as mesne profits antecedent to the decree are concerned, the plaintiff is required under section 50 of the Civil

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Procedure Code to name the amount claimed only approximately, and the court-fees have to be paid under section 7, clause (1) of the Court Fees Act, according to the amount claimed. Section 11 of the Court Fees Act then provides that if the amount decreed ultimately exceeds the amount claimed, the decree is not to be executed till the deficit court-fees have been paid. This applies whether the mesne profits are awarded by the decree itself or are left to be ascertained in the course of the execution of the decree. In so far as mesne profits between the institution of the suit and the delivery of possession under the decree to be made are concerned, it does not appear that the plaintiff is required to state the amount even approximately. In fact, even an approximate statement is impossible, as the amount must vary with the length of the period during which the litigation continues. On this principle, it has been ruled by the Bombay High Court in *Ram Krishna v. Bhimabai* (1), by the Madras High Court in *Maiden v. Janakiramayya* (2), and by this Court in *Bunwari Lal v. Daya Sunker* (3), that no court-fees are required to be paid, either in the original or in the Court of Appeal, in respect of the possible value of mesne profits *pendente lite*. It is manifest, therefore, that mesne profits antecedent to the suit and mesne profits *pendente lite* stand on very different grounds. In fact, as regards the latter, there is no cause of action at the time of the commencement of the suit, and it is only by means of statutory provisions framed with the obvious purpose of shortening litigation, that they can be awarded in the suit even though they accrued subsequent to the institution of the suit. The mesne profits antecedent to the suit have, on the other hand, accrued before the

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(1) (1890) 1 L. R. 15 Bom. 416. (2) (1893) 1 L. R. 21 Mad. 271.

(3) (1909) 13 C. W. N., 815.

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cases, a Munsif may be invested with jurisdiction to try suits not exceeding in value Rs. 2,000. Section 21 then provides that appeals from any decree of the Subordinate Judge lie to the District Judge in all cases in which the value of the suit does not exceed Rs. 5,000. In cases in which the value exceed Rs. 5,000 the appeal lies to the High Court. Appeals from the decrees of the Munsif lie to the District Judge. The policy of the Legislature as indicated by these provisions is obvious. Suits of which the value exceed Rs. 1,000 or in certain instances Rs. 2,000 shall be tried by a Subordinate Judge. If the value of the suit exceed Rs. 5,000, a first appeal shall lie to this Court in which not merely questions of law but also questions of fact may be investigated.

Let us now turn to the provisions of sections 211 and 212 of the Code of Civil Procedure of 1882. The first of these authorises the Court, which has seizin of a suit for recovery of possession of immoveable property, to provide in the decree for recovery of mesne profits from the institution of the suit to the delivery of possession. The second section deals with cases in which the claim is for recovery of possession and mesne profits antecedent to the suit. The Court may either determine the amount of the decree itself or direct an enquiry and dispose of the matter on further orders. Section 214 then provides that an enquiry into the amount of mesne profits in either of these contingencies must be made by the Court executing the decree. Clause (a) deals with mesne profits antecedent to the institution of the suit, that is, refers to cases covered by section 212.—Clause (b) refers to mesne profits *pendente lite* and covers cases mentioned in section 211. Now, in so far as mesne profits antecedent to the decree are concerned, the plaintiff is required under section 50 of the Civil

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particular facts of the case in which such expressions are to be found." It may further be observed that Courts have always been reluctant to extend the application of the case of *Rimeswar v. Dilu* (1) to cases not precisely similar: see *Gulab Khan v. Abdul Wahab Khan* (2), *Ijjatulla v. Chandra Mohan* (3), *Golap Singh v. Indra Kumar* (4) and *Manna Lal v. Samandu* (5). We are clearly of opinion that the rule laid down in *Rameswar v. Dilu* (1) cannot possibly be extended to the case before us for two weighty and obvious reasons, namely, *first* that the value of the claim for the mesne profits *pendente lite* which the decree-holder now invites the Court to investigate, is much in excess of the value of a suit which a Munsif is generally competent or may specially be authorised to try; and, *secondly*, that if the Munsif investigated the claim, there would be insuperable difficulty as to the *forum* of appeal, which could not be either the Court of the District Judge, who can hear appeals only in suits of which the value does not exceed Rs. 5,000, or this Court, because the Legislature never contemplated an appeal direct from a decision of the Munsif to the High Court. We must hold, therefore, that the Munsif cannot entertain the application for investigation of mesne profits *pendente lite* as the claim is laid at over Rs. 60,000. In our opinion, the proper course to follow is, to direct the return of the plaint, in so far as it embodies a prayer for assessment of mesne profits from the institution of the suit to the date of delivery of possession, for presentation to the proper Court, that is, the Court of the Subordinate Judge. In fact, the plaint may be treated as including two, if not three, distinct claims as we have already explained,

(1) (1891) I. L. R. 21 Calc. 551. (3) (1907) I. L. R. 34 Calc. 954.

(2) (1904) I. L. R. 31 Calc. 365. (4) (1909) 13 C. W. N. 423

(5) (1916) P. H. 46

and we may very well direct that the plaint, in so far as it includes a claim for mesne profits *pendente lite*, ¹²¹⁰ ~~be returned~~ ^{to the} ~~Court~~ ^{Karen} ~~Decreeholder~~ ^{for} ~~trial~~ ^{P.C.W.A.} ~~case~~ ^{part} should be returned for presentation to a Court of competent pecuniary jurisdiction. The decree-holder has no objection to the adoption of this course. But the judgment-debtor urges that if the mesne profits have been now estimated by the decree-holder with any approach to accuracy, the value of the property itself must have been very much higher than Rs. 6868, and the case should not have been tried by a Munsif. We are unable to give effect to this contention at the present stage after the suit, in so far as it is for recovery of land, has terminated and the decree of this Court has become final. It must further be remembered that the defendant did not take any exception to the value of the land and cannot now be heard to question the jurisdiction of the Court in that respect.

The result, therefore, is that this appeal is allowed and the orders of the Courts below discharged. The claim for mesne profits antecedent to the suit is dismissed as it is abandoned by the decree-holder. The plaint in so far as it embodies a claim for mesne profits from the institution of the suit on the 12th April 1902 to the delivery of possession on the 5th July 1907, will be returned to the plaintiff for presentation to the proper Court, that is, the Court of competent pecuniary jurisdiction. We do not decide whether, when the plaint is so presented, any question of limitation will arise, or if any question of limitation arises, whether section 14 of the Limitation Act will be of any assistance to the plaintiff. The appellant is entitled to his costs in the present proceedings in all the Courts.

The Rule will stand discharged.

G. S.

Appeal allowed; Rule discharged

P.C.^o
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Jan 31.

PRIVY COUNCIL.

NRITYAMONI DASSI

v.

LAKHAN CHANDRA SEN.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Limitation—Limitation Act (XV of 1877), s. 14—Suspension of cause of action.

In this appeal their Lordships of the Judicial Committee affirmed, on the question of limitation, the decision of the High Court in the case of *Lakhan Chandra Sen v. Madhusudan Sen* which is reported in I. L. R. 35 Calc. 209.

APPEAL 70 of 1911 from a judgment and decree (6th December 1907) of the High Court at Calcutta in its Appellate jurisdiction, which reversed a judgment and decree (10th August 1906) of a Judge of the same Court in the exercise of its ordinary original Civil jurisdiction.

The defendants were appellants to His Majesty in Council.

The suit which gave rise to this appeal arose out of the following circumstances:—One Guru Charan Sen died in 1872 leaving a widow and three sons, Baney Madhub Sen, Money Madhub Sen and Chuni Lal Sen. The respondents are the descendants of Money Madhub, and the appellants are the widow and

* Present: VISCOUNT HARDWICKE, LORD PARMOOR, LORD WRENTERBY AND MR. ANNEER ALI.

two of the sons of Baney Madhub. Chunni Lal, the third son, died in November 1881. In 1896 some of his sons brought a suit to have their rights and interests ascertained and declared in his property consisting of "eight houses" in Calcutta, for possession of their shares, which had been for some years in the possession of the principal defendants, and for other relief. In that suit (882 of 1896) the present respondents were also made defendants: they, however, supported the claim of the plaintiffs, and also asked for a declaration that they, too, were entitled to a share in the property in dispute. The suit was tried in the High Court by Mr. Justice Henderson, who on 20th April 1903 found that the "eight houses" in suit never passed from the possession and ownership of Guru Charan Sen during his lifetime. He held also that a deed of declaration of 30th June 1891, and a deed of trust of 18th January 1892, upon which the defendants relied, were not real transactions, and were inoperative to pass any property. He, therefore, substantially decreed the plaintiffs' claim, and declared that the present respondents (some of the then defendants) were also entitled to a one-third share in the property. An appeal (29 of 1903) was then filed by those defendants who contested the suit, and that portion of the decree of HENDERSON J., which gave the relief asked for by the present respondents was, on 22nd February 1904, set aside on the ground, among others, that as suit was one for ejectment and not a partition suit, relief could not be given, as between two co-defendants.

The present suit was brought on 14th November 1904 by the respondents, Lakhan Chandra Sen and his brothers, the sons of Money Madhub, for a one-third share in the "eight houses," which had devolved on their father on the death of Guru Charan Sen. The

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defendants were the representatives of Baney Madhub Sen and Chuni Lal Sen.

The principal defendant who contested the suit was Nityamoni Dassi, the widow of Baney Madhub Sen, whose defence was that the property in dispute belonged to her mother-in-law Surat Kumari Dassi; and that about the year 1891 Surat Kumari, in pursuance of a *bond fide* family arrangement, made a gift of her *stridhan* properties among the three different branches of the families of her three sons, in consideration of which gift, Baney Madhub Sen and Money Madhub Sen by a deed of covenant, dated 30th June 1891, transferred whatever right and interest, if any, they had in the property to Surat Kumari Dassi, who by a deed of trust, dated 18th January 1892, dedicated it to the family idols, and that she since that date had been in possession of the property as a trustee. She also pleaded that the suit was barred under the Limitation Act (XV of 1877).

The suit was dismissed by BODILLY J. on the ground that it was barred by the law of limitation; and on appeal by the plaintiffs (respondents) was heard by SIR FRANCIS W. MACLEAN C.J. and HARINGTON and FLETCHER JJ. who reversed the first Court's decision on the question of limitation.

The decision of the Appellate Court and also the judgment of BODILLY J., then appealed from on that question, will be found reported in the case of *Lakhan Chandra Sen v. Madhusudan Sen*, I. L. R. 35 Calc. 209.

On this appeal,

De Gruyther, K.C., and *Ross, K.C.*, for the appellants.

Sir William Garth and *Edward F. Spence*, for the respondents.

The judgment of their Lordships was delivered by

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MR. AMEER ALI who, after stating the facts, continued : As their Lordships concur generally with the reasons given by the Appellate Court for overruling the plea of limitation, they do not wish to prolong the present judgment by dealing wth the question at any length. They desire, however, to observe that if the property belonged in fact to Surat Kumari, and was held by her all along in her own right, as has been the defendants' contention throughout the various stages of this long-drawn litigation in India, obviously no question of limitation arises; neither their father nor the plaintiffs had or have any title to it, and their suit must fail on that ground.

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If, however, the "eight houses" never belonged to Surat Kumari, as is now conceded at their Lordships Bar, if they always remained the property of Gurt Sen and devolved on his sons by right of inheritance then the declarations made by them in the "deed o covenant," which are now admitted to be wholly false in no way altered the title. It did not purport to transfer any right: it was only an admission of a right which did not exist. There is no allegation, far less any evidence, that Surat Kumari pretended to exercise any right under that document adversely to the real owners until January 1892. It was after the execution of the trust deed of 1892 that Baney Madhub, purporting to act as one of the trustees, began to collect the rents and issues of the eight houses to the exclusion of the other co-sharers. Limitation would no doubt run against them from that time. But it would equally without doubt remain in suspense whilst the plaintiffs were *bond fide* litigating for their rights in a Court of Justice. They had in the suit of 1895 before Mr. Justice Henderson associated themselves with the plaintiffs in that action, and had asked for an adjudi-

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cation in those proceedings of their rights. A distinct issue was framed in respect of their claim, to which no objection seems to have been made by the appellant Nrityamoni; and the learned Judge who decided the case pronounced, with reference to their prayer, the following order:—

"The defendants, the representatives of Money Madhub, will be declared jointly entitled to a one-third share in the scheduled properties, and the Official Referee will make similar enquiries with regard to their share and the share of Nemye Charan Sen, as to mesne profits and the deeds, assurances, and other things which may be necessary. These defendants will be entitled to get possession of the shares to which they have been declared entitled."

It was an effective decree made by a competent Court, and was capable of being enforced until set aside. Admittedly, if the period during which the plaintiffs were litigating for their rights is deducted, their present suit is in time. Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court.

As regards the nature and effect of the deed of covenant of the 30th June, 1891, their Lordships have no hesitation in holding, in concurrence with the High Court, that it was wholly illusory; that it never operated to transfer any rights, nor in fact was it intended to do so; and that it was a mere device for deceiving the creditors of Baney Madhub and Money Madhub, and sheltering the property under their mother's name by making an acknowledgment of a right which never existed. All the facts and circumstances taken in conjunction with the statements in the document itself contravert the suggestion that it was part of a *bona fide* family arrangement.

Their Lordships are of opinion that the decree of the High Court in Suit 826 of 1904 is right, and should be affirmed.

For these reasons, their Lordships are of opinion that the judgment of the High Court is right and that this appeal should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellants will pay the costs of the appeal.

Appeal dismissed.

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Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents: *Downer & Johnson.*

J. V. W.

APPELLATE CIVIL.

Before Holmeood and Imam JJ

DALCHAND SINGHI

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v.

Jan. 11.

THE SECRETARY OF STATE FOR INDIA.*

Land Acquisition—Godowns used as servants' residence—House or building whether part of—Acquisition of such godown alone, legality of—Land Acquisition Act (I of 1894) ss. 49 (1), 54—Practice—Appeal.

Godowns necessary as residence for servants are part and parcel of a building [within the meaning of s. 49 (1) of the Land Acquisition Act] being a most important part of that building for the purpose of letting it out to gentlemen as a place of residence.

The acquisition of such godowns would thus be an acquisition of a part of a house contrary to the provisions of the Act.

It has never been doubted that an appeal would lie in the case of such an order under that section.

Hazun Molla v. Tasiruddin (1) distinguished

APPEAL by Dalchand Singhi, the claimant.

* Appeal from Original Decree, No. 397 of 1915, and Rule No. 929 of 1915, against the decree of H. P. Duval, Special Land Acquisition Judge, 24-Parganas, dated June 29, 1915

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In this case the Calcutta Municipal Corporation had moved Government to declare that, for the purpose of improving the junction of Camac Street and Short Street, 1 chitack 26 square feet of land covered by part of some servants' quarters should be acquired out of premises. No. 24, Camac Street belonging to one Dalchand Singhi, who had let out the house for some years in two flats each with its separate kitchen and servants' quarters. The main house was situated almost on Short Street having to the south a tennis lawn facing east and west with a row of out-offices beyond used as stables, etc. The main entrance at present was to the north-west from Camac Street, the second entrance from Short Street having been closed by the tenants. The proposal was to acquire a triangle (its two sides being 11 feet 10 inches and 12 feet) on the north-west corner of the compound, taking away thereby the whole of one and part of a second godown at the corner of the premises. Before the Land Acquisition Collector, 24-Parganas, the claimant contended that the loss of those godowns would affect the full and unimpaired use of the house and consequently the matter was referred to the Special Land Acquisition Judge, 24-Parganas. At the request of the parties the Judge visited the house and, although it was pointed out that new servants' quarters could not be erected without taking away the tennis court, dismissed the claimant's reference observing as follows :—

"The house is already right on Camac Street and the extra few feet of land taken away can make very little difference. Mr. Collingwood (a house agent) is not prepared in his evidence to say that the letting value of the house would be permanently affected if this second godown at the entrance is taken away. Admittedly entries do not go into the compound now. The entrance therefore in Short Street could be equally well used and if a wall is built on the Camac Street corner, there would be no greater nuisance from dust and noise than there is at present. In this view I must

hold that the full and unimpaired use of the house, as a house, even though the present tenant of the downstairs flat may not like to live there, will not be impaired by this godown being taken away. It may mean that a servant who has hitherto lived in the premises would have to live outside in the future, but that is not a sufficient reason in my opinion for holding that the small part wanted is necessary for the full and unimpaired use of the house. I therefore dismiss the claimant's reference with costs."

Being dissatisfied with this order the claimant preferred this appeal to the High Court.

Babu Provas Chandra Mitra (with him *Babu Jnanendra Nath Sarkar* and *Babu Uma Charan Lahar*), for the appellant. Under the provisions of section 49 of the Land Acquisition Act, I requested that the whole property should be acquired and the Collector referred the question to the Civil Court.

Babu Ram Charan Mitra, for the respondent. I have a preliminary objection. Section 54 of the Land Acquisition Act allows an appeal only from an award. If there is no determination of value, as here, no appeal will lie: *Hasun Molla v. Tassiruddin* (1). The sole question here is whether this mali's godown is part of the house. See section 25 for meaning of "award" of which there is no definition in this Act. Reading section 54 with section 25 I submit that the present appeal is incompetent.

[*HOLMWOOD J.* We should have to interfere in revision on the ground that the Judge has gone quite beside the question to be decided, viz., does the land form part of the house?]

Babu Provas Chandra Mitra, for the appellant. I submit that an appeal does lie. The following rulings—*Venkataratnam Naidu v. The Collector of Godavari* (2), *Nita Ram v. The Secretary of State for India* (3), *Khairati Lal v. The Secretary of State for India* (4) were all decisions on appeal.

(1) (1911) 1 L. R. 39 Calc. 393.

(2) (1903) 1. L. R. 27 Mad. 350.

(3) (1908) 1. L. R. 30 All. 176.

(4) (1899) 1. L. R. 11 All. 378.

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[HOLMWOOD J. In *Khairati Lal v. The Secretary of State for India* (1), the appeal was heard where they held that the whole property and not a portion could be acquired.]

In *Nita Ram v. The Secretary of State for India*(2), only a small portion of garden was taken, not so in *Venkataratnam Naidu v. The Collector of Godavari* (3) which is on all fours with the present case. *Khairati Lal v. The Secretary of State for India* (1) is most in my favour. The onus is on Government to show this portion is not necessary for the proper enjoyment of the house. I submit that these godowns being the servants' quarters are part of the house. The Collector before making the valuation referred the matter to the Special Judge, 24-Parganas, who is the Land Acquisition Judge for Calcutta as well.

[HOLMWOOD J. (to respondent). What have you to say to this?]

Babu Ram Charan Mitra. Does the taking of a small piece of land matter?

[HOLMWOOD J. One cannot live without servants. In every other country except India servants live under the same roof as the master.]

Babu Provas Chandra Mitra. As it is, the premises has so little servants' quarters that if more be taken it would become highly inconvenient.

HOLMWOOD AND IMAM JJ. This is an appeal from an order of the Special Land Acquisition Judge at Alipore on a reference made by the Collector under section 49 (*t*) of the Land Acquisition Act. It appears that the owner of the house demanded a reference on the point on the ground that the cutting of the corner

(1) (1889) 1. L. R. 11 All. 378. (2) (1908) 1. L. R. 30 All. 176.

(3) (1903) 1. L. 27 Mad. 350.

of his compound with the whole of one and part of a second godown near the gate would be the acquisition of a part of his house contrary to the provisions of the Act. The learned Collector in making the reference drew attention to the question of what would be reasonably required for the full and unimpaired use of the house, but he very properly made the reference in terms of the section for the determination of the question whether the land proposed to be acquired does or does not form part of the house. The learned Special Land Acquisition Judge appears to have entirely ignored this question which is the only question he had to decide and to have based his decision on a clause in section 49 which allows him to take into consideration the question whether the land proposed to be taken is reasonably required for the full and unimpaired use of a house, manufactory or building. That such a question should be taken into consideration where the circumstances allow there can be no doubt. But it cannot be held that that is the only question, or indeed the main question to be decided.

In appeal before us a preliminary objection is taken that no appeal lies, and the authority of *Hasim Molla v. Tasiruddin* (1) is cited. That is direct authority only for the proposition that an order of the Special Land Acquisition Judge refusing to restore a claim case by setting aside a decree passed *ex parte* for default of the claimant, is not an award and does not come within section 54 of the Land Acquisition Act, but the learned Judges who decided that case pointed out that in every case the order complained of must be considered and the Court has to see whether that order is an award or any part of an award. An order of this nature has been dealt with in appeal on

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several occasions by the Allahabad Court and by the Madras Court, and it has never been doubted that an appeal would lie. But assuming that it did not lie, we should certainly have to interfere in this case in the exercise of our powers of revision which we have been asked to exercise by a petition upon which a Rule has been issued.

We have already noted that the learned Judge's judgment had altogether missed the point for adjudication; and the only point for consideration is whether these godowns do or do not form part of the premises which consist of a gentleman's house and the necessary out-buildings attached to it, or whether they are separate pieces of land which can be taken away without detriment to the reasonable requirements for the full and unimpaired use of the house. In deciding the latter point the learned Judge makes use of a somewhat curious argument. He says that because the accommodation for servants is already extremely defective it cannot injure the owner to make it still more defective. This is an argument to which we cannot accede. The fact is that these two godowns which the learned Judge calls "durwan's godowns" are the only servants' house properly speaking in the whole of the premises. The premises have been let in flats apparently for many years and there are two kitchens one on each side of the house which of course cannot be used as residences for the servants. There is a stable and there is a very small hut by the side of the stable which is said to be the residence of the sweeper. Where the superior servants of the two tenants live we are at a loss to conceive, unless they live in these durwan's lodges. The Judge himself shows that no durwan is required because he says no carriages ever enter the compound. It seems to us that these two godowns are necessarily

part and parcel of the building and a most important part of that building for the purpose of letting it out to gentlemen as a place of residence.

We must, therefore, set aside the order made by the learned Judge and direct that this portion of the building be not acquired unless the whole premises are acquired by the Land Acquisition Collector. The costs given against the claimant in the lower Court must be refunded, if paid, and there will be costs of this hearing in favour of the appellant.

The Rule will be made absolute for the same reasons without costs.

G. S.

*Appeal allowed.
Rule absolute*

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CRIMINAL REVISION.

1915

Before Greaves and Walmley JJ

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ABDUL ALI CHOWDHURY

v.

EMPEROR.*

Security to keep the Peace—Conviction under s. 143 of the Penal Code—Absence of finding of acts involving breach of the peace or evident intention of committing the same—Legality of order for security—Criminal Procedure Code (Act V of 1898) s. 106

To bring a case within the terms of s. 106 of the Criminal Procedure Code, the Magistrate should expressly find that the acts of the accused involved a breach of the peace or were done with the evident intention of committing the same, or at all events the evidence must be so clear that

* Criminal Revision No. 1159 of 1915, against the order of H. A. Street Sessions Judge of Sylist, dated July 24, 1915.

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without an express finding, a superior Court is satisfied that such was the case.

**ABDUL ALI
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v.
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Jib Lal Gir v. Jogmohan Gir (1) followed.

A finding that the common object of the unlawful assembly was by means of criminal force or show thereof to take possession of land cultivated by a tenant of the rival landlord, and that, but for the direction of the latter to the tenants to retire, which was carried out, there might have been a serious riot, held insufficient to bring the case within the purview of s. 106 of the Code.

THE facts of the case were as follows. One Afroz Bakht Chowdhury, a zemindar in the Arangpur pargana, purchased in 1312 B.S. the lands of two brothers, Sonai Mia and Monai Mia, and settled them with Syama Bap. A dispute last year between Afroz and his brother, Yar Bakht, on the one side, and a Hindu *mirasdar* on the other, led to the former being bound down, under s. 107 of the Criminal Procedure Code, to keep the peace for one year in the sum of Rs. 5,000. The prosecution story was that on the 23rd March 1915 Shabaz Mia, the son of Sonai, and Abdul Ali Chowdhury, the brother-in-law of Monai, went in a large body numbering about 200 men, armed with *luthis* and spears, to take forcible possession of the lands of Syama Bap. Afroz, on being informed of the fact, directed Syama and other tenants cultivating in adjoining plots not to resist the party of the accused but to retire quietly to the house of one Alphu Morali which they did. Afroz also sent a letter to the Balaganj police station relating what had happened. The police held an investigation upon the letter and sent up 19 persons. Sixteen of them were placed on trial before the Additional District Magistrate of Sylhet, three having been prevented from appearance in Court through illness. The Magistrate acquitted two of the accused and convicted the rest under s. 113 of the Penal Code, on the 5th July, sentencing them

to three months' rigorous imprisonment, and binding them down, under s. 106 of the Code, to keep the peace for one year. His findings were as follows:—

I hold it proved that on the 23rd March last accused No. 1, Shabaz Mia, and No. 2, Abdul Ali Chowdhury, led a large body of armed men and drove out Syama Bap from the land he was cultivating as *fotlar* under Afroz. The common object of the unlawful assembly was by means of criminal force or show of it to take possession of the plot of land cultivated by Syama Bap, and all the persons proved to have been members of this unlawful assembly are guilty under s. 143 I. P. C. It remains to be considered what sentence should be inflicted on the 14 accused. There can be no doubt that, had not Afroz directed Syama Bap and his other tenants not to resist the accused but to remain quietly in Alphu Morali's *bari*, there might have been a serious riot, as Afroz is the leading zemindar in Aurangpur and must have many men under his control. Obviously the accused thought they had their enemy at their mercy, as, if on account of having been bound down he decided not to resist, they could do what they liked in seizing the land by force; while if he did resist and a riot ensued, they would get him muled of Rs. 5,000.

On appeal, the Sessions Judge of Sylhet acquitted Shabaz and upheld the conviction and sentences of the rest. He merely found that "no occurrence in the way of a fight actually took place." The accused thereupon moved the High Court and obtained a Rule on the ground that the order under s. 106 was illegal.

Mr. Rasul (with him *Babu Hemendra K. Dass*), for the petitioner. The offence under s. 143 of the Penal Code does not involve a breach of the peace, and a conviction thereunder does not justify an order under s. 106 of the Criminal Procedure Code: *Jib Lal Gir v. Jogmohan Gir* (1), *Baidya Nath Majumdar v. Nibaran Chunder Gope* (2), *Raj Narain Roy v. Bhagabat Chunder Nandi* (3). There must be a conviction of an offence involving a breach of the peace: *Kishore Sirkar v. King-Emperor* (4). The findings here are insufficient.

(1) (1899) I L. R., 26 Calc 676

(3) (1909) I L. R., 35 Calc. 315.

(2) (1902) I. L. R., 30 Calc 93

(4) (1903) 8 C. W. N. 517

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The Deputy Legal Remembrancer (Mr. Orr), for the Crown referred to *Jib Lal Gir v. Jogmohan Gir*(1). The findings show an intention to commit a breach of the peace which was frustrated in the circumstances of the case by the prosecutor's party retiting from the disputed land.

GREAVES AND WALMSLEY JJ. The accused in this case were convicted under section 143 of the Indian Penal Code and bound down under section 106 of the Code of Criminal Procedure. It has been urged before us that the order under section 106 of the Criminal Procedure Code is without jurisdiction as there was no finding of any likelihood of a breach of the peace being committed or of any evident intention of committing acts which would involve a breach of the peace. The Appellate Court came to no finding upon this point. All that is said in the judgment of the Appellate Court is that the appellants formed with others an unlawful assembly with the common object set forth in the charge. In the lower Court the findings are as follows: "The common object of this unlawful assembly was by means of criminal force or show of criminal force to take possession of the plot of land cultivated by Syama Bap." There is a further finding to this effect: "There can be no doubt that, had not Afroz Bakht Chowdhry directed Syama Bap and his other tenants not to resist the accused but to remain quietly in Alpha Morali's *bari*, there might have been a serious riot, as Afroz Bakht is, according to the evidence on the record, the leading zemindar in Aurangpur and must have many men under his control. Obviously the accused persons thought that they had their enemy at their mercy, as if on account of having been bound down under

section 107 of the Code of Criminal Procedure he decided not to resist their attacks they could do what they liked in seizing the land by force, while if he did resist their armed attack by sending a similar body of men and a riot ensued, they would be able to get him muled of the amount of Rs. 5,000." Various decisions have been quoted before us, but it seems to us that the law is succinctly and accurately laid down in *Jib Lal Gir v. Jogmohan Gir* (1) where it is said that "being a member of an unlawful assembly does not necessarily involve a breach of the peace. It does, however, involve an apprehension that a breach of the peace may result. Nor does a conviction of an offence under section 113 of being a member of an unlawful assembly necessarily amount to a conviction of 'taking unlawful measures with the evident intention of committing' a breach of the peace. In order to bring the acts of the accused within either of these terms it is necessary that the Magistrate should expressly find that the acts of the person convicted amounted to this, or at all events that the evidence is so clear that, without such an express finding, a superior Court, such as a Court of Revision, should be satisfied that the acts do involve a breach of the peace or an evident intention of committing the same." We have already referred to the findings in this case and they do not seem to us to sufficiently and clearly show that the acts for which the accused were convicted under section 113 necessarily involve a breach of the peace or any evident intention of committing the same.

The Rule is, therefore, made absolute, and the order under section 106 of the Code of Criminal Procedure set aside.

E. H. M.

Rule absolute.

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everor

ORIGINAL CIVIL.

Before Chaudhuri J.

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Dec. 20

KUMAR KRISHNA DUTT

v.

HARI NARAIN GANGULY.*

Costs—Solicitor's lien for costs—Minor—Next friend—Attorney's costs for proceedings undertaken on the next friend's instructions—Whether attorney is entitled to a charge on the minor's property for his costs so incurred—Practice.

Where a suit has been brought by a minor through his next friend for declaration of the infant's title to and possession of property, the attorney is entitled to have a charge declared on the properties for the amount of costs incurred by him and he is entitled to recover the same in a suit.

Shaw v. Neale (1), *Baile v. Baile* (2), *Pritchard v. Roberts* (3), *In re Howarth* (4), *Helps v. Clayton* (5), *Ex parte Tweed* (6), *Narendra Nath Sircar v. Kamalbasini Dasi* (7), *Devkabai v. Jefferson, Bhaishankar and Dinsha* (8), *Khelter Kristo Miller v. Kally Pronuno Ghose* (9), *In re Wright's Trust* (10), *Watkins v. Dhunnoo Baboo* (11), *Sham Charan Mal v. Chowdhry Debya Singh Pahraj* (12), *Ispahani v. Chundi Charan Pal* (13) and *Braison v. Appasami* (14) referred to.

THE plaintiff in this suit sought to recover from the defendant, who is an infant, the sum of Rs. 446-2 for balance of taxed costs in a suit, which had been instituted in this Court on the infant's behalf by his mother as next friend, for a declaration of the infant's

* Original Civil Suit No. 1300 of 1914.

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| (1) (1858) 6 H. L. C. 581, 601. | (8) (1886) I. L. R. 10 Bom. 248, 253. |
| (2) (1872) L. R. 13 Eq. 497. | (9) (1898) I. L. R. 25 Calc. 897, 899. |
| (3) (1873) L. R. 17 Eq. 222. | (10) [1901] 1 Ch. 317. |
| (4) (1873) 8 Ch. App. 415. | (11) (1881) I. L. R. 7 Calc. 140. |
| (5) (1864) 17 C. B. (N.S.) 553. | (12) (1894) I. L. R. 21 Calc. 872. |
| (6) [1899] 2 Q. B. 167. | (13) (1905) 9 C. W. N. exca. |
| (7) (1896) I. L. R. 23 Calc. 563, 573 | (14) (1891) I. L. R. 17 Mad. 257. |

title to and possession of certain house property in Calcutta. The plaintiff claimed that he was entitled to a charge on the infant's property for the amount of his claim and he also submitted that he was entitled in this suit to an order for the sale of the property in default of the payment of the amount claimed. On behalf of the infant defendant a written statement had been filed in which it was submitted that there could be no decree for costs against the defendant personally and that costs could not be recovered from the estate. It was also contended that the plaintiff should have proceeded by way of an application in Chambers, or that if a suit were instituted, it should have been instituted in the Small Cause Court. It was also urged that unnecessary costs had been incurred in the suit filed on the infant's behalf.

Mr. C. C. Ghose and Mr. N. Sircar, for the plaintiff.

Mr. I. B. Sen and Mr. S. G. Ghose, for the defendant.

CHAUDHURI J. This is a suit by an attorney to recover from the defendant, who is an infant, the sum of Rs. 446-2 for balance of taxed costs in suit No. 158 of 1912, which was instituted in this Court on the infant's behalf by his mother as next friend, for declaration of the infant's title to and possession of certain houses in Calcutta. The plaintiff submits that he is entitled to a charge for the said sum on the said premises, and further that he is entitled in this suit to an order for sale of the premises in default of the payment of the amount claimed.

The defendant by his guardian *ad litem* Sarat Chunder Chatterjee, has filed a written statement in which he submits that there can be no decree for costs against the infant defendant personally, nor can such costs be recovered from the infant defendant's estate; that the plaintiff should have proceeded by way of an

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—
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J.

application in Chambers on summons, or, if referred to a suit, such suit ought to have been instituted in the Small Cause Court; he does not admit that Rs. 446-2 is due and submits that the costs in suit No. 158 of 1912 were unreasonably and unnecessarily incurred by the engagement of two counsel, one of them a senior counsel, inasmuch as the suit was undefended; and that further the plaintiff is not entitled to the costs (i) of procuring the attendance of two witnesses named in the 8th paragraph of the written statement, and (ii) of the production of records from the Small Cause Court when certified copies would have been sufficient; he also states that the taxation of the plaintiff's bill in the first suit was *ex parte* and submits that the infant defendant is not bound thereby.

No witnesses have been examined on behalf of the defendant, and I hold upon the evidence on behalf of the plaintiff that the original suit No. 158 of 1912 was properly instituted and was for the benefit of the infant; that it also became necessary to execute the decree obtained in that suit, and possession of the properties has been recovered on behalf of the infant defendant; that two counsel, including a senior, were properly engaged and the costs of procuring the attendance of the witnesses above mentioned, and of the production of records were justly incurred; and that the taxation was properly made. The present guardian *ad litem* attended for the greater part of the time when the bill was under taxation. He did not attend at the final stage, when an undertaking, which had been given on behalf of the next friend to file a warrant of attorney, was not complied with, and no letter of authority was produced by him on the mother's behalf. In fact learned counsel appearing, instructed by the attorney for the guardian *ad litem*, stated that he could not press any of the charges as the guardian was

not prepared to give any evidence. This suit I hold has been properly instituted. The mother had no doubt signed a warrant of attorney in Suit No. 158, and she was primarily liable for its costs. An application in chambers for realisation upon the allocatur could only have been made against her in that suit. A suit for declaration of a charge on immoveable property is not maintainable in the Small Cause Court. Besides, the question raised in this suit, as to whether immoveable property belonging to an infant can be so charged, is a question of some difficulty, and a fit one for this Court.

Formerly in England before statutory provision was made, it was undoubtedly the law that a solicitor could not claim a lien on real estate, even if recovered by his services: *Shaw v. Neale* (1). It was said by the Lord Chancellor in that case that "To hold that a solicitor obtaining a real estate for his client could be entitled to a lien upon it for his costs and charges, would be entirely contrary to the principle upon which the doctrine of lien proceeds. There can be no lien upon any property unless it is in the possession of the party who claims the lien. But if an estate is recovered by a solicitor, or, if through a solicitor it is conveyed to the client, the solicitor is not in possession of the estate, but his client is in possession of it. All that the solicitor has are the deeds and documents. He has a lien upon them. He may render them available for the purpose of establishing his claim. But it is quite clear that he cannot say, that he has any such lien upon the estate as, within the principle of the doctrine which I have suggested, can entitle him to maintain it as a charge upon the property." Since that case the principle has been largely extended and its applicability to cases other than those of

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possession recognised, and a statutory charge on all classes of property has been created in England in favour of solicitors, by 23 & 24 Vict. c. 127. The law in England has since been more and more liberally construed in favour of solicitors.

In Baile v. Baile (1), it was argued that the employment of a solicitor by the next friend could not be construed as his employment by the infant plaintiff within the meaning of section 28 of the English Statute, but this contention was overruled by the Vice-Chancellor.

In *Pritchard v. Roberts* (2), the solicitor had at first applied under the Declaration of Titles Act of 1862, in the name of the infant and got a declaration in his favour, but not possession of the estate. Then a bill was filed in the infant's name for partition or sale, and ultimately the infant's share was sold and money was paid into Court to the credit of the partition suit. Then the solicitor applied to have it declared that he had a lien on the fund in Court for the costs incurred on the petition under the Declaration of Titles Act, of the partition suit and of the suit he had instituted to have the lien on the funds recovered. It was argued on his behalf that the costs might have been recovered in an action at law against the infant on the strength of *In re Howarth* (3), and might be treated as necessaries: *Helps v. Clayton* (4). Sir Charles Hall, V. C., held that the plaintiff was entitled to all the costs he had asked for and to have his lien declared. He held that, inasmuch as those costs might in a circuitous manner be made to come out of the infant's estate, namely, if the solicitor had sued the next friend of the infant for those costs and recovered them, the next friend might have recovered them

(1) (1872) L. R. 13 Eq. 497.

(2) (1873) L. R. 17 Eq. 222.

(3) (1873) L. R. 8 Ch. App. 415.

(4) (1864) 17 C. B. (N. S.) 553.

against the infant's estate, it was right and equitable to make the order.

In *Ex parte Tweed* (1), section 28 of the Solicitors' Act of 1860 was held applicable to a solicitor who had acted for the executor in certain probate proceedings to a charge for his costs in an action upon the property devised and bequeathed by the will as property "recovered and preserved" through his instrumentality. The bulk of the property was realty. Originally the probate of a will did not affect the realty, or those interested in it in any way. But the effect of 20 & 21 Vic. c. 77, sections 61, 62, one of the learned Judges held, had done away with the distinction between personality and realty, and the order was accordingly made. In this country it has been laid down by the Privy Council that there is no

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his costs out of the estate. It was not so ordered by the trial Court, and that was also one of the grounds why the lien claimed in that case was not allowed.

In *Khetter Kristo Mitter v. Kally Prosunno Ghose* (1), the learned Judge said as follows: "Whether the attorney's lien on the fund recovered in suit is the most appropriate mode of description, it is unnecessary to discuss, for the nature of the right is free from doubt. It is a claim on the part of the attorney to have secured to him his due reward out of the fruit of his labour, and for that purpose to call in aid the equitable interference of the Court." In this Court it has been held such right extends to immoveable property. In fact in later English cases it has been held that it is not quite correct to say that the solicitor's lien is a "common law lien": see the observation of Rigby L. J. in *In re Wright's Trust* (2) endorsed by the Lord Chief Justice (on page 324). It is a lien which has been recognised by every branch of the High Court in England, and since there is no distinction in this country between personal and real property, we are not hampered by a distinction which used to be made in England, where justice and equity are in favour of the right claimed. The broad principle underlying the recognition of the charge is, that a solicitor ought to be secured the fruits of his labour, although, in the case of absence of contractual liability, the charge has sometimes been described as in the nature of salvage lien, and in the case of absence of contractual capacity as arising out of the supply of necessaries.

In *Watkins v. Dhunnoo Baboo* (3), the solicitor instituted a suit to recover certain costs from the minor's estate. The infant through his mother as next

(1) (1894) I. L. R. 25 Calc. 887, 889. (2) [1901] 1 Ch. 317, 321, 324.

(3) (1881) I. L. R. 7 Calc. 140.

friend had originally sued his uncle for an account and partition of the estate of his grandfather, and partition was directed, and the infant's share upon such partition was delivered to the receiver of this Court. Then a suit was instituted against the infant and others challenging the infant's title. That suit was dismissed, but no costs could be recovered from the adverse party although attempts were made to execute the decree for costs. It was contended against the solicitor's claim that there was no contract by or on behalf of the infant who, under the Civil Procedure Code, had to act vicariously through other persons. The learned Judge held that the costs of a proper suit, or defence of a suit in which the property was involved, were recoverable from the infant's estate and that the attorney was entitled to succeed. Such costs were treated as being in the nature of "necessaries" for an infant.

In *Sham Charan Mal v. Chowdhry Debya Singh Pahraj*(1), the learned Judges followed the above case, although they said that it was not necessary to discuss whether the principle, which underlay the decision in *Watkins v. Dhunnoo Baboo*,(2) could be supported in its entirety.

In *A. M. B. Ispahani v. Chundi Charan Pat* (3), Harington J. held that a solicitor's charge on property recovered, was a first charge.

Branson v. Appasami (4) has been cited as opposed to the ruling in *Watkins v. Dhunnoo Baboo* (2)—but in that case the suit was repudiated by the minor on attaining majority, and it was held that *Watkins v. Dhunnoo Baboo* (2) had no application, inasmuch as the infant in that case had not repudiated, but was still an infant when the suit was instituted.

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I quite agree with the contention that there cannot be a personal decree against the infant, but I hold, upon the consideration of the facts of this case and the law as it at present stands, that the attorney is entitled to have a charge declared on the properties for the amount claimed in this suit and he is entitled to recover same in this suit. There is evidence that he has not been able to realise the amount from the lady, although he has not proceeded in execution against her. She is a lady apparently without any property. I would have required the attorney to exhaust his remedies against the mother before allowing him to proceed against the infant following the observation made in *Baile v. Baile* (1), that the attorney was bound to show the incapacity of the next friend to pay, or at least to attempt to make her pay, those costs before coming to assert the charge, if I felt that there was any reasonable chance of getting any relief from the mother. It seems to me that to ask him to take such proceedings against the lady would be to throw the burden of additional costs upon the infant, which ought to be avoided. I am also specially inclined to make this order, inasmuch as I understood from learned counsel, who appeared instructed by the guardian *ad litem*, that he was at one stage prepared to pay the costs claimed in this suit if the charges made by him against the attorney of incurring costs unnecessarily were shown to be unjust. Such charges have clearly been shown to have been altogether unjust and were improperly made. The attorney would be entitled to add his costs of this suit to his claim and enforce them against the infant's properties recovered in the original suit. I would have directed the guardian *ad litem* personally to pay the costs of this suit, if I felt

there was any chance of recovering such costs from him. The infant should not be ordinarily burdened with such costs if they can be avoided. This case has not taken beyond a day's hearing and was necessary to institute to have the charge declared, and it does not seem to me unjust to make the order for costs as above made.

W. M. C.

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CIVIL REFERENCE.

Before D Chatterjee and Beachcroft JJ

*In re POORNA CHANDRA ADDY.**

Unprofessional Conduct—Pleader as litigant—Letter to Munsif threatening legal proceedings to recover costs, in execution proceedings, incurred owing to the negligence of the Court Officer - Legal Practitioners Act (XVIII of 1878) ss. 13(b) and 14—Anonymous communication—Contempt of Court

1915

Dec 22.

Where a pleader who was a decree-holder in a certain suit associated himself with his co-decree-holder in a notice to the Munsif threatening legal proceedings to recover costs in an execution proceeding incurred owing to the negligence of the Court Officers though the pleader did not sign the notice —

Held, that what was done by the pleader was done by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character or anything done by him professionally, and that this case was not one within s. 13(b) of the Legal Practitioners Act.

In re Wallare (1), *In the matter of Jogendra Narayan Basu* (2), *In re a Pleader* (3), *In the matter of a first grade Pleader* (4), and *In the matter of Sarat Chandra Guha* (5) referred to.

* Civil Reference No. 6 of 1915, under s. 14 of the Legal Practitioners Act, by H. Allanson, District Judge of Cuttack, dated May 1, 1915.

(1) (1866) L. R. 1 P. C. 283

(3) (1907) 18 Mad. L. J. 184

(2) (1900) 5 C. W. N. 48

(4) (1900) 1 L. R. 24 Mad. 17

(5) (1900) 4 C. W. N. 663

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REFERENCE under s. 14 of the Legal Practitioners Act.

One Poorna Chandra Addy, a pleader practising in the courts at Puri, and his cousin, Mahesh, obtained a joint decree in a suit before the second Munsif of Puri. On the date fixed for sale in execution of the decree the decree-holders discovered that the sale-proclamation had not been duly published owing to the negligence of the Court Officers. They, thereupon, applied for a fresh sale-proclamation. This application was dismissed by the Munsif and the case was struck off with the result that the whole cost of the execution proceeding was lost for no default of the decree-holders. The decree-holders having obtained legal advice as to whether they could recover damages from the Munsif, wrote to him to the following effect: "We have by your illegal and unwarrantable conduct as aforesaid suffered a loss of Rs. 7-7-3, being the amount of costs incurred as specified below. I hereby give you notice that both the aforesaid Babu Poorna Chandra Addy and myself shall adopt legal proceedings against you for the said sum." This letter was actually written by Poorna Chandra Addy and signed only by Mahesh. The Munsif made a report in this matter to the District Judge, who instituted proceedings against Poorna Chandra Addy under s. 14 of the Legal Practitioners Act, calling on him to show cause why he should not be reported to the High Court as guilty of grossly improper conduct in the discharge of his professional duty. After hearing pleader on behalf of Poorna Chandra Addy, the District Judge made the following reference to the High Court:—

1. "The above-named pleader and Babu Mahesh Chandra Addy are joint decree-holders. They took out execution of their decree in execution case No. 995 of 1914 in the Court of the 2nd Munsif of Puri. A copy of the order sheet of this case (marked B) is on the record. The Munsif dismissed the case as infructuous for the reasons given in the order of

15th February 1915. On the 26th February he received the letter marked A, dated 25th February. It is in the handwriting (alimittedly) of Babu P. C. Addy, pleader, one of the joint decree-holders. It is in the name of both decree-holders, but is signed only by Babu M. C. Addy. It is a notice to the Munsif that the two decree-holders are going to take legal proceedings against him for Rs. 7-7-3 the costs incurred in the execution proceedings. The letter was sent to me by the Munsif.

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2. The notice marked C, dated 15th March 1915, is a notice from me on the pleader under section 14 of the Legal Practitioners Act, calling on him to show cause why he should not be reported to the High Court as guilty of grossly improper conduct in the discharge of his professional duty (section 13(b)).

To the notice is attached the charge.

The pleader has not appeared in person before me, but appeared through another pleader of this Court. A suggestion made by me that an apology should be offered was not accepted.

3. Briefly the charge against the pleader is that knowing full well that no suit could lie against the Munsif in respect of his dismissal of the execution case, he was guilty of grossly improper conduct in the discharge of his professional duty by writing this letter in his own name and in that of the other decree-holder, and that his action was not *bond fide* and was dictated by a desire to harass the Munsif.

4. There can be no question that in view of the provisions of Act XVIII of 1850 no suit could lie against the Munsif in respect of the order passed by him dismissing the execution case. It was argued before me that this Act only protects the Munsif if he acted in good faith, and the suggestion was made that the Munsif's action was *mala fide*. Not the slightest attempt was made to show how his action was *mala fide*, and this suggestion in my opinion only aggravates the original offence. It is not my duty in this proceeding to discuss whether or not the Munsif's order was legal. If it was illegal, the decree-holders had a means of redress by moving the higher judicial authorities. Any Court may err in law.

5. It was also argued that if the notice was mere waste paper, it should be treated as such. Of course if the notice had not been written by a pleader, the present proceedings could not be taken, and the suit might be awaited. But if the notice is a mere empty threat, the Pleader's conduct is in my opinion indefensible.

6. It was of course argued that the pleader wrote the letter as a private party, i.e., as a litigant, and therefore he could not be guilty of professional misconduct.

It is noteworthy that despite the fact that the pleader wrote the letter in his own name and in that of his co-decree-holder, he did not himself sign

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it. That very fact would show that his action was not *bond fide*. He does not of course plead that he wrote as a legal practitioner at the dictation of his client.

7. The real question for decision in this matter appears to me to be, whether a pleader, who is a party in a suit, is at liberty to write to the Munsif who has passed an order of which he disapproves, threatening him with a suit for recovery of the costs incurred in the suit when as a pleader he must know perfectly well that no such suit can lie.

It does seem to me that a pleader who acts like this is guilty of grossly improper conduct in the discharge of his professional duty. A litigant, who is not a legal practitioner, may write such a letter, if he likes. He may even think that such a suit would lie and may in that case bring it. But a pleader knows that no such suit would lie, and of course he would not waste his money by bringing it. How then can his action be *bond fide*? The object of the letter is obvious. The intention of the pleader who wrote it in his own name—though he shrank from signing it—could only be dictated by *mala fides* and by a desire to harass, annoy and browbeat the Munsif.

8. If such conduct on the part of a pleader who is himself a litigant is not improper professional conduct, then every Judge who passes an order that does not commend itself to the pleader litigant, may be exposed to receiving a letter of this kind threatening him with legal proceedings for "illegal and unwarrantable conduct." The gravamen of the charge is that he knew no such suit would lie, and that his threat was an empty one.

9. It was argued that in any case his conduct could not come within sub-sections (a) and (b) of section 13, and that therefore this Court had no right to take action under section 14. I am of opinion that what he has done does come within section 13 (b), at any rate for this reason that he does not sign the letter as a litigant. It is in his handwriting and is signed by the other party to the suit. If he wrote it as a litigant he should have signed it. It appears to me that it may be held he wrote the letter as a legal adviser. He has been very clever in the matter. For as it is in their joint names he may argue that he wrote as a litigant, yet if he wrote as a litigant why did he not sign it himself?

10. I consider it my duty to report the whole matter under section 14 to the High Court for such orders as the Hon'ble Judges may think fit. I come to a finding that he is guilty of grossly improper conduct in the discharge of his professional duty by writing this letter, and I consider that he should be suspended for a period as a warning.

Charan Sinha and Babu Dharendra Krishna Roy, for the petitioner.

The Senior Government Pleader (Babu Ram Charan Mitra), for the opposite party.

Cur. adv. vult.

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D. CHATTERJEE J. Babu Poorna Chandra Addy is a pleader practising in the Courts at Puri. He and his cousin Mahesh had an execution case before the second Munsif of Puri. On the date fixed for sale, the decree-holders found out that the sale-proclamation had not been duly published. They applied for the issue of a fresh sale-proclamation on the ground that the non-publication was due to the negligence of the Court officers. If the facts were, as stated above, the most proper and just course for the learned Munsif would have been to grant the application. He rejected it, however, and struck off the case and the whole cost of the execution was lost for no default of the decree-holders. They were naturally annoyed and took legal advice as to whether they could recover damages from the Munsif. It is said that they were advised that such a case would lie, their advisers relying on the case of *Tarucknath Mookerjee v. The Collector of Hooghly* (1). Mahesh insisted upon fighting out this case and a notice was given to the Munsif signed by Mohesh but written out by Babu Poorna Chandra to the following effect—"We have by your illegal and unwarrantable conduct as aforesaid suffered a loss of Rs. 7-7-3 being the amount of costs incurred as specified below. I hereby give you notice that both the aforesaid Babu Poorna Chandra Addy and myself shall adopt legal proceedings against you for the said sum." The learned Munsif made a report to the District Judge of Cuttack and the said officer instituted

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proceedings under section 14 of the Legal Practitioners Act against Babu Poorna Chandra for grossly improper conduct in the discharge of his professional duty, inasmuch as the letter of notice was in his handwriting and must have been written with his knowledge and by his advice and inasmuch as he knew that no such suit would lie, his action in writing it and allowing it to be signed by Mahesh was not *bond fide* and was dictated by a desire to harass the Munsif. Babu Poorna Chandra in showing cause said that the notice was given under legal advice without any intention of harassing the learned Munsif and even if the advice was wrong he had acted *bond fide* as a litigant in the exercise of his legal rights and not as a pleader acting for a client, and no charge of professional misconduct would lie.

The learned Judge asked him to apologise, but he chose to stand upon his legal rights and did not. The learned Judge has, therefore, made this reference under section 14 of the Legal Practitioners Act holding that the pleader was guilty of grossly improper conduct in the discharge of his professional duty.

It is contended before us that the reference is incompetent and should be discharged.

I think that this contention is right. What was done in this case was done "by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor, and it had no connection whatever with his professional character or anything done by him professionally;" see *In re Wallace* (1), *In the matter of Jogendra Narayan Basu* (2), *In re a pleader* (3), *In the matter of a first grade pleader* (4). The learned senior Government pleader, who appeared in this case

(1) (1866) L. R. 1 P. C. 283

(3) (1907) 18 Mad. L. J. 187.

(2) (1900) 5 C. W. N. 48

(4) (1909) I. L. R. 24 Mad. 17.

on notice from the Court, did not support the reference as one warranted by clause (b) of section 13, but he said that the language used was intemperate and as the pleader did not accept the invitation of the Judge to make an apology, he deserved some censure by this Court. The language was perhaps a little harsh, but it was the language of a litigant smarting from what he considered a wilful disregard of his just rights merely for the sake of administrative despatch when the greater part of the fault was not with him but with the office of the Court. Then again the part that he took in helping his co-litigant to give the notice was an insignificant one - he merely copied the letter and refrained from joining openly in the assertion of what he was advised was his legal right. It is admitted by his learned vakil that the advice was wrong, and in the absence of malice his client had no right to maintain a suit for damages for a judicial act, but that does not take the case further than this that he and his advisers committed an error of law. No doubt the error was rather serious in this case as it led to a breach of that amity and mutual understanding which should always exist between the Bench and the Bar. Justice to the litigant is the end for which the Bench and Bar are the means and the powers of the one and the privileges of the other are ordained for the attainment of that end by their harmonious co-operation. It is to be regretted, therefore, that there was a discord in this case. The error however, was nevertheless an error of law which cannot be treated as professional misconduct: see *In the matter of Sarat Chandra Guha* (1). He has, however, in this Court through his vakil expressed his regret for what has happened and there is an end of the matter.

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J.

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 ADDY,
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 J.

I may, in this connection, mention that while the case was awaiting judgment, I received a type-written envelope posted at Puri and enclosing some newspaper cuttings containing aspersions against the Munsif concerned in this case. Babu Poorna Chandra, through his vakil, disowns all knowledge of this and expresses his regret that any body should have done it. I accept his statement and hold him blameless in the matter. I think it my duty, however, to say that whoever may be responsible for the sending of these cuttings in an anonymous cover with a type-written superscription which cannot be identified, is guilty of a gross contempt of Court. It is an attempt to interfere with the due administration of justice; it is unfair to the party for whose benefit it is done; it is unfair to the party slandered who has no means of meeting it, and it is unfair to the Court which might, humanly speaking, be unconsciously influenced without being able to deal with the perpetrator in due course of law. Conduct like this is cowardly ungentlemanly, and in the highest degree reprehensible, and I hope no one connected with the Puri Bar had any hand in it.

In this view of the case, I discharge the Rule.

BEACHCROFT J. I agree that the Reference ought to be discharged on the ground that the case is not one within section 13 (b) of the Legal Practitioners Act. I am, however, sceptical of the truth of the pleader's allegations that he took and acted on other legal advice in sending the objectionable letter to the Munsif. But even if it be assumed that it was sent with the intention of annoying the Munsif, I do not think it necessary to take any further notice of the matter.

We have no explanation from the Munsif as to why he rejected the prayer for issuing a fresh sale-proclam-

ation in the execution proceedings, but on the facts stated his order dismissing the execution case appears to be wholly indefensible. The Munsif ought to have been thankful to the decree-holders for bringing to his notice the defect in the execution proceedings, and incidentally in the working of his office, instead of penalizing them for it. Human nature being what it is, one must not view the action of the pleader too seriously. Having had time for reflection, he would have been well advised to accept the suggestion of the learned District Judge and offer an apology to the Munsif. I am not impressed by the offer of an apology in this Court at the eleventh hour when the pleader felt that he might get into trouble. But in the circumstances the matter may now be allowed to rest.

I associate myself with the strictures of my learned brother on the sending of anonymous communications.

O M

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Poona

Chandra

Addl,

In re

Bachchopur

J

PRIVY COUNCIL.

P.C.^o
1916

SHEOPARSAN SINGH

v.

March 16.

RAMNANDAN PRASAD SINGH.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Declaratory Decree, suit for—Specific Relief Act (I of 1877) s. 42—Suit by alleged reversioner for declaration of title—Legal interest or character necessary to support claim—Suit to revoke probate after will had been affirmed by Probate Court—Suit by reversioner to prevent waste by Hindu widow, not analogous—Rule of res judicata, origin and application of—Rule existing in Hindu as well as English law.*

On an application to the District Court, by the first respondent, for probate of the will of *B*, a Hindu who died leaving two widows but no male issue, the appellants entered a caveat denying the genuineness of the will, and asserting that they were the reversioners of *B* and had therefore a *locus standi* to oppose the grant of probate. The District Court held that the caveators had failed to prove their interest, and granted probate of the will to the first respondent as executor by implication. The High Court on appeal affirmed that decision, and the appellants without any further appeal instituted a suit in the Subordinate Judge's Court against the first respondent and the two widows for a declaration that they were the next reversioners to the estate of *B* according to Hindu Law in the case of an intestacy, and as such were entitled to obtain revocation of probate. The first Court gave them a decree, but on appeal the High Court held that the suit was barred by section 13 of the Civil Procedure Code, 1882, as being *res judicata* by the decision of the District Court in the probate proceedings.

Held by the Judicial Committee (without deciding the question of *res judicata*), that the suit was not maintainable with reference to section 42 of the Specific Relief Act (I of 1877): the will had been affirmed by a Court of appropriate jurisdiction, and its decision could not be impugned by a Court exercising different jurisdiction: for the purposes of the suit the will must stand, and there was no intestacy. The appellants had therefore shown no legal character or title which would justify them

* Present: The LORD CHANCELLOR (LORD BEECKHARTER), VISCOUNT BALDWIN, SIR JOHN EDGE, MR. AWEER ALI AND SIR LAWRENCE JESSUP.

'n asking for the declaration sought, and the suit must be dismissed as misconceived and incompetent.

The right of a reversioner to sue where a widow in possession for her life estate was committing acts of waste to the prejudice of those who might succeed to the property on her death, was not analogous: such a position necessarily assumed the absence of an immediate and absolute testamentary disposition. Suits of that kind formed a very special class, and the question in them was one solely between the reversioner and the widow, the former being unable by such a suit to get as between himself and a third party an adjudication of title which he could not obtain without it.

Kathama Natchiar v. Doraunga Tever (1) referred to.

Sembler: The rule of *res judicata* while founded on ancient precedent is dictated by a wisdom which is for all time: see 6 Coke's Institutes 9A. Though the rule may be traced to an English source it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, citing for this purpose a text of Katyayana: see Mitakshara (Vyavahara) Book II, Ch. I (edited by J. R. Gharpure), p. 14; and Mayukha, Ch. I, s. 1 p. 11 of Mandlik's edition. The application of the rule by the Courts in India should therefore be influenced by no technical considerations of form but by matter of substance within the limits allowed by law.

APPEAL 67 of 1913 from a judgment and decree (19th April 1910) of the High Court at Calcutta, which reversed a judgment and decree (21st December 1907) of the Subordinate Judge of Mozafferpur.

The plaintiffs were the appellants to His Majesty in Council.

The main questions for determination in this appeal were whether the appellants were entitled to a decree declaring them to be the nearest reversioners to the estate of one Rup Narayan, alias Bachu Singh, deceased; and whether their claim was or was not barred by the rule of *res judicata*.

Rup Narayan Singh died on 12th November 1899, leaving a will dated 6th November 1899. He left surviving him the respondent Ram Nandan Prashad

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Narayan Singh, his *kartaputra* or adopted son, and two widows Ram Rachan Kunwar, since deceased, and the respondent Ram Kishori Kunwar. Ram Nandan Singh as the executor appointed by the will applied on 22nd September 1902 for probate in the Court of the District Judge of Mozuferpur. The application was opposed by three sets of caveators, of which the appellants represented the first set. The case was numbered 26 of 1903 in the District Court and was set down as a contentious case between the parties.

The appellants set up their claim as collateral relatives of the deceased and, as such, his nearest reversioners.

Ram Nandan Singh denied that the appellants or any of the caveators were related to the deceased or had any interest in his estate as reversioners, and denied also that they had any *locus standi* in the proceedings. The issue so raised between the appellants and Ram Nandan Singh was tried before the District Judge, evidence, oral and documentary, being adduced by both parties.

On 24th March 1903 the District Judge delivered his judgment, and made a decree declaring that the appellants and also the other caveators, were not related to the deceased and had no interest in his estate as reversioners. He further determined the question as to the factum of the will, and made a decree directing probate to issue to Ram Nandan Singh, and dismissing the caveats with costs.

The appellants appealed to the High Court against the judgment and decree of the District Judge, both as against the finding that they were not reversioners and the grant of probate to Ram Nandan Singh; and on 8th February 1905 the High Court affirmed the judgment and decree of the District Judge and dismissed the appeal with costs.

On 7th August 1905 the appellants instituted the suit, out of which the present appeal arose, against Ram Nandan Singh and the widows of the deceased Rup Narayan Singh. In their plaint they alleged that the will was not genuine, and that Ram Nandan was not the *kartaputra* of the deceased; and they asked for a declaration that they were the next reversioners to his estate on an intestacy and as such were entitled to sue for revocation of the probate.

The defendant Ram Nandan denied the plaintiffs' title as reversioners, and pleaded that that question was a *res judicata* under section 13 of the Code of Civil Procedure, 1882; and that the suit was not maintainable as being a suit for a declaration only within the meaning of section 42 of the Specific Relief Act (I of 1877).

The pleadings and the issues are set out in the judgment of their Lordships of the Judicial Committee.

The Subordinate Judge held that the suit was maintainable, notwithstanding section 42 of the Specific Relief Act; that the suit was not barred by section 13 of the Code; that the plaintiffs had proved that they were the nearest reversioners to the estate of Rup Narayan Singh; and that Ram Nandan was not his *kartiputra*; and he made a decree declaring that the plaintiffs were the next reversionary heirs of Rup Narayan Singh.

Ram Nandan appealed to the High Court and the appeal was heard by CASPERSZ and DIGAMBAR CHATTERJEE JJ. who agreed with the Subordinate Judge as to the title of the plaintiffs, as to Ram Nandan not being the *kartaputra* of the deceased; and as to the suit being maintainable; but they held that the suit was barred as being a *res judicata*. They therefore allowed the appeal, and dismissed the suit.

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On the death of Ram Nandan Singh his widows and heiresses, the respondents Bhagwati Kunwar and Jhuna Kunwar, were substituted in his place on the record.

The judgment of the High Court will be found reported in 11 Calc. L. J. 623.

On this appeal,

De Gruyther, K. C., and *Sir William Garth*, for the appellants, contended that the suit was not barred by section 13 of the Civil Procedure Code, 1882, which contained all the principles of *res judicata* applicable to the case. The proceeding in the Court of the District Judge under the Probate and Administration Act (V of 1881) was not a suit within the meaning of section 13 of the Civil Procedure Code. Its object was not to determine a question of title, but to obtain for the executor appointed by the will, the power to represent and deal with the estate. Various sections of Act V of 1881 were referred to, to show the character of, and procedure in, the application for probate. If mere opposition to it made it a suit, sections 53, 55, 83 and 86 of the Act would be unnecessary. The decision of the District Judge in such proceedings was not a judgment in rem: see *Kurrutulain v. Nuzbatud-dowla* (1). It did not operate as a *res adjudicata* as it was not the decision of a Court which had jurisdiction to entertain the present suit: see *Gokul Mandar v. Pudmanand Singh* (2), and *Misir Ragho Bardial v. Sheo Baksh Singh* (3), though the suit after being instituted in the Court of the Subordinate Judge might have been transferred under section 25 of the Code to the District Court. Moreover, the question whether the appellants were the next reverors

(1) (1905) I. L. R. 33 Calc. 116; (2) (1912) I. L. R. 29 Cal. 707;

L. R. 32 I. A. 244

L. R. 29 I. A. 195

(3) (1892) I. L. R. 9 Cal. 439; L. R. 9 I. A. 197.

was a question of title only incidentally arising in the probate proceedings. *Ran Bahadur Singh v. Luchu Koer* (1), *Arunmoyi Dasi v. Mohendra Nath Waddir* (2), *Jagannath Prasad Gupta v. Ranjit Singh* (3), *Ganesh Jagannath Dev v. Ramchandra Ganesh Dev* (4), *Lalit Mohan Das v. Radharaman Saha* (5), *Pittapur Raja v. Buchi Sitayya* (6), Act XXVII of 1860. Preamble and section 3, and Probate and Administration Act (V of 1881) section 82 were also cited.

As to the suit being maintainable with reference to section 42 of the Special Relief Act (I of 1877), it was contended that the appellants were suing to get rid of what they considered a danger to their reversionary interests, and the Subordinate Judge had a discretion to make a declaratory order under that section, in the same way as such an order might be granted against a widow dealing wrongly with property which she held for a life estate.

A. M. Dunn, for the respondents, contended that the appellants were not entitled to a declaratory decree. They might have applied for revocation direct to the probate jurisdiction; but such an application would, having regard to the previous decision of the District Judge, have been held to be barred by section 13 of the Civil Procedure Code, and they should not be allowed to obtain in this suit what they could not have obtained in the District Court under Act V of 1881.

But the suit was barred under section 13 of the Civil Procedure Code by the decision of the District Judge. Though there was no definition of "suit" in

(1) (1894) I. L. R. 11 Calc. 391; (4) (1896) I. L. R. 21 Bom. 513.

L. R. 12 I. A. 23

(5) (1911) 15 C. W. N. 1021.

(2) (1893) I. L. R. 20 Calc. 888.

(6) (1894) I. L. R. 8 Mad. 219;

(3) (1897) I. L. R. 25 Calc. 354.

L. R. 12 I. A. 16

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the Code or in the General Clauses Act, the proceedings before the District Court assumed the form of a suit under the Civil Procedure Code with its incidents; and was substantially a suit; see sections 4, 54, 62 and 69 of the Probate and Administration Act (V of 1881). The issue as to the pedigree was necessary for the judge to determine. That he was then exercising probate jurisdiction was not material: see section 12 of the Civil Procedure Code 1882. He was a "competent Court" and his jurisdiction extended to the matter of the suit: see explanation (6) to section 13. Section 15 was therefore inapplicable. More Courts than one may be competent to entertain a suit: see sections 15 and 16 (a). The only object of the present suit was to obtain a declaration which would enable the appellants to obtain a revocation of probate under section 50 of Act V of 1881. Reference was made to *Pittapur Raja v. Buchi Sitayya* (1). The English cases were not wholly in point: so far as they are applicable they support the respondents. *Barrs v. Jackson* (2), *Spencer v. Williams* (3), and *Concha v. Concha* (4) were cited, of which the last named case was distinguishable since the determination of the question there, was not necessary for the decision of the Probate Court.

De Gruyther K. C., in reply, referred to *Gopal Mandar v. Padmanand Singh* (5) as showing conclusively that the Probate Court was not competent to try the present suit.

The judgment of their Lordships was delivered by

March 16.

SIR LAWRENCE JENKINS. This is an appeal against a decree of the High Court at Calcutta, dated the

(1) (1884) I. L. R. 8 Mai. 219.

(4) (1886) I. L. R. 11 A. C. 511.

(2) (1845) 1 Phill. 582.

(5) (1902) I. L. R. 29 Calc. 707.

(3) (1871) I. L. R. 2 P. & D. 230, 235.

I. L. R. 29 I. A. 196.

19th April, 1910, reversing the decree of the Subordinate Judge of the First Court, Mozufferpur, dated the 21st December, 1907.

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The express purpose of the litigation is to obtain a declaration that the plaintiffs are the next rever-sioners to the estate of Babu Bachu Singh according to Hindu law, and, as such, entitled to apply for a revocation of probate.

The facts may be shortly stated. On the 12th November, 1899, Bachu Singh died, leaving two widows, the defendants Musammat Ram Rachan Kunwar and Musammat Ram Kishori Kunwar, but no male issue. On the 22nd September, 1902, the defendant Ram Nandan Singh applied in the Court of the District Judge of Mozufferpur for probate of a writing alleged by him to be the last will of Bachu Singh. In that writing he is described as Bachu Singh's *kartaputra*.

The two widows, though heiresses of the deceased Bachu Singh, did not oppose the application. Caveats, however, were lodged by three groups of persons, and the plaintiffs in this suit were the members of one of these groups. There thus arose a contention as to the grant of probate, and the proceedings thenceforth took, as nearly as might be, the form of a suit according to the provisions of the Code of Civil Procedure, in which the petitioner, Ram Nandan Singh, was the plaintiff, and the plaintiffs in this suit, with others, were the defendants. In due course issues were framed, and they raised the two material and essential questions: *first* whether the present plaintiffs, as persons by whom the caveat had been entered, had, as it was termed, any *locus standi* to oppose the application for probate; and, *secondly*, whether the will propounded was the genuine and duly executed will of Bachu Singh.

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After evidence, oral and documentary, it was held on the first issue that the caveators had failed to prove their interest, and on the second issue that the will was proved. In accordance with this finding it was ordered that "probate be granted to Ram Nandan Prashad Singh, petitioner, executor."

From the order sheet it appears that Ram Nandan was held to be an executor by implication. The present plaintiffs preferred an appeal to the High Court. The appeal was heard and dismissed with costs on the 8th February, 1905. No appeal was preferred to His Majesty in Council. But on the 7th August, 1905, the present suit was instituted in the Court of the First Subordinate Judge of Mozafferpur. The plaint states the material facts save that it erroneously alleges that letters of administration with the will attached were granted to Ram Nandan. It is then averred in paragraph 9 as follows:—

"These plaintiffs have been advised that so long as these letters of administration are in force they have no claim to the reversionary right to the estate of the deceased; and, furthermore, that they cannot apply for the revocation of the said letters of administration until what time they obtain a declaratory decree from the Civil Court to the effect that they are the nearest reversioners according to Hindu law of the deceased Babu Singh, and therefore entitled to his estate in case of an intestacy after the death of the defendants second party."

The defendants second party were the two widows. The prayer of the plaint, as originally framed, was in these terms:

"that it be declared that the plaintiffs are the next reversioners to the estate of the late Babu Babu Singh according to Hindu law."

By a subsequent and significant amendment these words were added,

"and as such are entitled to apply to the Probate Court to get the probate or letters of administration granted to Ram Nandan Singh revoked."

Before the hearing Musammut Ram Ruchan Kunwar died, and by an order of the 4th February, 1907,

her co-widow was substituted in her place as legal representative.

On the 6th November the following issues were framed :—

- 1st. Is the suit maintainable ?
- 2nd Is the suit barred by section 13 of the Code of Civil Procedure ?
- 3rd Is the suit bad for non-joinder of parties ?
- 4th. Is the suit barred by limitation ?
- 5th. Are the plaintiffs the nearest reversionary heirs of Rup Narayan Singh, alias Bachu Singh ?
- 6th Is the defendant No. 1 the *kartaputra* of the said Rup Narayan Singh ?

On these issues the findings of the Subordinate Judge were in the plaintiffs' favour, and by the decree it was declared that the plaintiffs were the *gotis* of and reversioners to the estate of Babu Bachu Singh. In the plaint there was no prayer as to their *gotiship*.

An appeal to the High Court was preferred by Ramnandan Prashad Singh. It succeeded on the ground that the suit was barred by the rule of *res judicata*. But though the High Court held that the case was governed by section 13 of the Code of Civil Procedure, it tried the issue, which, in that view, was withdrawn from its consideration by the terms of the section.

From this decree the plaintiffs have preferred the present appeal.

The contest before their Lordships has been confined to the two issues :—

- 1st. Is the suit maintainable ?
- 2nd. Is the suit barred by section 13 of the Code of Civil Procedure ?

The first of these problems takes the more specific form of an enquiry whether in the circumstances of this case the plaintiffs are entitled to claim from the Court a mere declaratory decree of the character proposed.

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"and as such are entitled to apply to the Probate Court to get the probate or letters of administration granted to Ram Nandan Singh revoked."

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her co-widow was substituted in her place as legal representative.

On the 6th November the following issues were framed :—

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- 2nd. Is the suit barred by section 13 of the Code of Civil Procedure ?
- 3rd. Is the suit bad for non-joinder of parties ?
- 4th. Is the suit barred by limitation ?
- 5th. Are the plaintiffs the nearest reversionary heirs of Rup Narayan Singh, alias Bachu-Singh ?
- 6th. Is the defendant No. 1 the *karlaputra* of the said Rup Narayan Singh ?

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- 2nd. Is the suit barred by section 13 of the Code of Civil Procedure ?

The first of these problems takes the more specific form of an enquiry whether in the circumstances of this case the plaintiffs are entitled to claim from the Court a mere declaratory decree of the character proposed.

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RAMNARAN The Court's power to make a declaration without more is derived from section 42 of the Specific Relief Act, and regard must therefore be had to its precise terms. It runs as follows :—

PRASAD SINGH. "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief : Provided, that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

A plaintiff coming under this section must, therefore, be entitled to a legal character or to a right as to property. Can these plaintiffs predicate this of themselves? Clearly not; and this is, in effect, stated in the plaint, where they described themselves as entitled to Bachu Singh's estate *in case of an intestacy* after the death of the defendant widows (para. 9).

But as things stand there is no intestacy: Bachu Singh's will has been affirmed in a Court exercising appropriate jurisdiction, and the propriety of that decision cannot in the circumstances of this case be impugned by a Court exercising any other jurisdiction.

It is not suggested that in this litigation the testamentary jurisdiction is, or can be, invoked, and yet there can be no doubt that this suit is an attempt to evade or annul the adjudication in the testamentary suit, and nothing more.

This is apparent from the plaint, from the amendment made in the High Court after Ramnandan had died, and from the very circumstances of the case.

This use of a declaratory suit illustrates forcibly the warning in *Sree Narain Mitter v. Kishen Soondry Dassie* (1) where it was said :

"There is so much more danger in India than here of harassing and

vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

Here, however, no question of discretion arises; the suit fails at the very outset, for the plaintiffs, while the will stands, as stand it must for the purposes of this suit, are not clothed with a legal character or title which would authorise them to ask for the declaratory decree sought by their plaint. The suit, therefore, should be dismissed because it is misconceived and incompetent.

Some reference was made in the course of the argument to a reversioner's right to sue where a widow with the particular interest was committing acts of waste to the prejudice of those who might succeed to the inheritance on her death. But such a position of necessity assumes the absence of an immediate and absolute testamentary disposition.

In this connection there is an instructive comment in *Kathama Natchiar v. Dorasinga Tever* (1) where it was said in reference to such suits:

"Suits of that kind form a very special class, and have been entertained by the Courts *ex necessitate rei*. It seems, however, to their Lordships that if such a suit as that is brought it must be brought by the reversioner with that object, and for that purpose alone, and that the question to be discussed is solely between him and the widow; that he cannot, by bringing such a suit, get, as between him and a third party, an adjudication of title which he could not get without it."

There has been much discussion at the Bar as to the application of the plea of *res judicata* as a bar to this suit. In the view their Lordships take, the case has not reached the stage at which an examination of this plea and this discussion would become relevant. But in view of the arguments addressed to them their Lordships desire to emphasise that the rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time.

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SHEOPARAN SINGH " 'It hath been well said,' declared Lord Coke, '*interest reipublicæ ut sit finis iurium*, otherwise great oppression might be done under colour and pretence of law.' "—(6 Coke, 9 s.)

RAMNANDAN PRASAD SINGH.

Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: "If a person though defeated at law sue again he should be answered, 'You were defeated formerly. This is called the plea of former judgment.' (See "The Mitakshara (*Vyavahara*)," Bk. II, ch. i, edited by J. R. Gharpure, p. 11, and "The *Māṇava*," Ch. i., sec. 1; p. 11 of Mandlik's edition.)

And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

Their Lordships have not failed to observe that Ram Nandan Prashad Singh died before the hearing in the High Court, but they refrain from pronouncing any opinion as to its legitimate consequence in this suit, for this formed no part of the discussion before them. They have dealt with this litigation, as it was presented to them, apart from the possible effect of Ram Nandan's death.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of such of the respondents as have appeared.

Appeal dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents 1 and 2: *Greenfield & Cracknell.*

J. V. W.

PRIVY COUNCIL.

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March 16.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Endowment—Nature, object, custom and practice of muth or asthal—Right of succession as Mahant, custom of—Mahant appointing a married man and father of children to be Mahant—Abdication by Mahant of his functions—Right of his senior chela to succeed him.

In this appeal the question was whether the appellant who claimed to be senior chela of the first respondent, the late mahant who had retired, or the second respondent who claimed to have been appointed by him, was entitled to succeed him as the mahant of the Patepur asthal or muth. On this question their Lordships of the Judicial Committee held (reversing on the evidence the decision of the High Court) in favour of the appellant, mainly on the ground that the second respondent was a married man who had not on initiation renounced his worldly ties and the begetting of children, and was not an ascetic or bairagi chela, but was disqualified from holding the office of mahant.

As to the nature, object, custom, and practice of such a religious institution, *Sammantha Pandara v. Sellappa Chettu* (1) was referred to.

The question as to who had the right to succeed to the office of mahant depended, according to the well-known rule in India, not on the general customary law, but upon the custom and usage of the particular muth.

Mahant Rawanooj Doss v. Mahant Debraj Doss (2), *Greedharee Doss v. Nundkissoore Doss* (3), *Muttu Rama Linga Setupati v. Perianayagum Pillai* (4), and *Raya Vurmah Valia v. Ravi Vurmah Kunhi Kutti* (5) referred to.

* Present VISCOUNT HALDANE, LORD SHAW, SIR JOHN EDGE AND MR. ANWER ALI.

(1) (1879) 1 L. R. 2 Mad 175, 179 (4) (1874) 1 L. R. 1 I. A. 209, 227.

(2) (1839) 6 S. D. A. (Beng.) 262 (5) (1876) 1 L. R. 1 Mad 233.

(3) (1867) 11 Moo. I. A. 405, 428. L. R. 4 I. A. 76 & 2.

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On the question as to the second respondent being a married man, on which the Courts below had differed, their Lordships were of opinion that the verdict given by the Subordinate Judge who had the advantage of seeing and hearing the witnesses, could not be lightly set aside, especially as that Judge was also presumably acquainted with the manners and customs of the people among whom such a transaction was alleged to have occurred. There were, moreover, no sufficient grounds stated by the High Court for disturbing that verdict. Having themselves investigated the facts, their Lordships held that the rule—of attaching weight to the opinion of the Judge of first instance—could not safely be departed from in the present case.

Though the deeds appointing the second and third respondents to be successively *mahants* were ineffective, the former being not competent to hold the office, and the latter having died, the first respondent could not, in their Lordship's opinion, be considered to be still the *mahant*. He had abdicated all his functions, and had himself retired from the office. A *mahant* was not only a spiritual preceptor, but a trustee in respect of the *asthal*. He had by appointing a married man and father of children to the office consented to a violation of those vows of asceticism and celibacy which it was his duty as a trustee to maintain and protect. His abdication must therefore be accepted as a fact in the case. A vacancy in the office had therefore been created which under the circumstances would devolve upon the appellant who was found to be senior *chela* and was not altogether to be incompetent to be *mahant*.

APPEAL 39 of 1914 from a judgment and decree (26th August 1910) of the High Court at Calcutta, which reversed a judgment and decree (16th June 1909) of the Court of the Subordinate Judge of Mozufferpur.

The plaintiff was the appellant to His Majesty in Council.

The suit which gave rise to this appeal was brought to establish the title of the plaintiff to the office and position of *mahant* of Asthal Patopur, a religious institution in the Mozufferpur district, and to the properties appertaining thereto which were of considerable value.

The plaintiff, Ram Parkash Das, claimed to be the senior *chela* or disciple of Anand Das the first

defendant who had held the *mahantship* from 1866 until 1897 when he resigned it; but his claim was wholly denied by the defendants, who asserted that he was the *chela* of one Baloram Das, and had never had any connection with Asthal Patepur; and the question whether the plaintiff was or was not the senior *chela* of Anand Das was the principal issue in

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turn denied by the defendants who all supported Anand Das' claim.

The suit was brought on 10th December 1906, and was framed in the alternative praying for a declaration that the plaintiff was the senior *chela* of Anand Das, and as such was entitled to succeed to the *mahantship* and the properties, or, if it were found that Anand Das had in fact resigned the office and given up possession of the properties, that the plaintiff might be put in possession thereof. - The plaint also prayed that the will, the deed of 14th May 1897, and the *ekrarnama* of the 6th August 1904 might be held to be fraudulent and void, and that the two last named might be cancelled.

The facts and evidence in the case will be found fully stated and discussed in the judgment of their Lordships of the Judicial Committee.

The Subordinate Judge held that the plaintiff was the senior *bairagi chela* of the first defendant; that the custom of succession alleged by the plaintiff was proved and he was entitled to succeed in preference to the second and third defendants though they were both chelas of Anand Das; that the second defendant was a married man and had begotten children after his initiation, and he therefore was not a *bairagi chela* at all and was therefore not qualified, to hold the office of *mahant*; that the will, the deed of 1897 and the *ekrarnama* of 1904 were collusive and void; and that Anand Das had relinquished the office of *mahant*, and was not competent to transfer his life-interest in it to the other defendants. His decree was that the plaintiff was entitled to the office and properties subject to certain provisions for the maintenance of Anand Das.

From that decision the defendants appealed, and the High Court (BRETT and VINCENT JJ.) reversed the decree of the Subordinate Judge, and dismissed the

suit with costs. The judgment summed up their conclusions as follows :—

"In the first place we disagree with the Subordinate Judge and find that the story told by the plaintiff of his joining the Patepur Asthal as a *chela* is incredible in itself and has not been satisfactorily proved. The account given of his initiation appears to be false as the day which he fixed for the same was a day of mourning at the Asthal. There is practically no evidence to prove his connection with the Asthal from April 4th 1884 when he says he was initiated up to February 1890 when he says he went away on pilgrimage and to study Sanskrit. The story told by him of the period intervening between February 1890 and October 1897 when he says he returned to the Asthal is not corroborated, and his statement that during that period he came back from time to time to Patepur for funds, does not strike us as probable. His story that from October 1897 to July 1904 he was at the Asthal and was not aware that defendant No 2 had been appointed *mahant*, is in our opinion not probable and not established by the evidence.

"On these grounds alone his suit will fail.

"On the other hand, we find that the defendants have fully established their case that under the custom prevailing in the Patepur Asthal the reigning *mahant* has power to select any one of his *chelas* whom he thinks most suitable for appointment as his successor, and the senior *chela* at the time of initiation has no prior right or claim to succeed. That a deed of appointment (*mahanti deed*) is drawn up and duly registered and that after that has been done, the *chela* selected to succeed is duly installed as *mahant* by the gift of *pagri* and *chadar*, &c., in the presence of assembled *mahants* and leading residents of the neighbourhood. We further find that there is no custom by which blood relations of a *mahant* are debarred from being selected to succeed him or from being appointed as *mahants*.

"We find that defendants Nos. 2 and 3 were duly initiated as *chelas* of Anand Das and that they were *baoris chelas* and not *grishast* (secular) *chelas*. We think the evidence offered to prove that the defendant No 2 is a married man is altogether inconclusive."

On this appeal,

A. M. Dunne, for the appellant.

Sir William Garth and *B. Dube*, for the respondents.

The arguments were entirely on the facts which will be found discussed and dealt with in the judgment of the Judicial Committee.

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For the law on the subject, which was not in dispute, the following cases were cited by counsel for the appellant :—

As to the origin and object of a *muth* as an institution of a religious character, *Sammantha Pandara v. Sellappa Chetti* (1) per SIR C. TURNER C.J. was referred to. As to the evidence and mode of proof of custom as to the succession, reference was made to *Greedharee Doss v. Nund Kishore Doss* (2) per LORD ROMILLY, *Muttu Ramalinga Setupati v. Perianayagum Pillai* (3), *Raja Vurmah Valia v. Ravi Vurma Kunhi Kutty* (4), *Janoki Debi v. Gopal Acharjya* (5), *Genda Puri v. Chatur Puri* (6), *Rama-lingam Pillai v. Vythilingam Pillai* (7), *Bhagaban Ramanuj Das v. Ram Praparna Ramanuj Das* (8), and *Sitapershad v. Thakurdas* (9). [LORD SHAW referred to *Mahant Ramanooj Doss v. Mahant Debraj Doss* (10).]

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LORD SHAW. This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 26th August, 1910, reversing a judgment and decree of the Second Subordinate Judge of Mozafferpore, dated the 16th June, 1909.

The question in the appeal has reference to the office and rights of a *mahant* of an *asthal*, known as the Patepore Asthal, in the district of Mozafferpore.

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| (1) (1879) I. L. R. 2 Mad. 176, 179. | (7) (1893) I. L. R. 16 Mad. 490, 493; |
| (2) (1867) 11 Moo. I. A. 405, 428. | I. R. 20 I. A. 150, 151. |
| (3) (1874) I. L. R. 1 I. A. 239, 228. | (8) (1895) I. L. R. 22 Calc. 813; |
| (4) (1876) I. L. R. 1 Mad. 235, 251; | I. R. 22 I. A. 24. |
| I. R. 4 I. A. 76, 83. | (9) (1879) 5 C. L. R. 73, 79. |
| (5) (1882) I. L. R. 9 Calc. 766, 771; | (10) (1893) 6 S. D. A. (Beng.) |
| I. R. 10 I. A. 32, 37. | 262, 263. |
| (6) (1896) I. L. R. 9 All. 1, 8; | |
| I. R. 13 I. A. 101, 105. | |

There are rival claimants to this office in the person of the plaintiff and of the defendant No. 2. The defendant No. 1, Anand Das, was the *mahant* of the Patepore Asthal. By written documents and by his actings he has, as will be afterwards found, abdicated. But in this litigation he supports the claim of defendant No. 2, in whose favour he has granted those deeds which will be hereafter referred to. The *asthal* is one of some importance, and is stated to have a revenue of 50,000 rupees a year.

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An *asthal*, commonly known in Northern India as a *muth*, is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets and the observance of its rites. The followers of the cult and disciples in the institution are known as *chelas*; the *chelas* are of two classes—celibate and non-celibate. In the *asthal* now being dealt with, the religious brethren were the *bairagi* or celibate *chelas*; the lay brethren were *girhast* or householder *chelas*. The *mahant* must, by the custom of the *muth*, be a *bairagi* or religious *chela*. The *mahant* is the head of the institution. He sits upon the *gaddi*; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself. Upon his death or abdication he is succeeded by one of the *bairagi chelas*. These *bairagi chelas* are, as stated, celibates; or if they have ever been married they must, prior to their initiation as *bairagi chelas*, have renounced their wives and families and have conformed to the practice of the *muth*. This practice is ascetic: it involves a separation from all worldly wealth and ties, and a self dedication to the services

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and rites of the *asthal*. (See, e.g., *Wilson's Religious Sects of the Hindus*, pp. 51, etc.)

"Pious persons endow the schools with property, which is vested in the preceptor for the time being, and a home for the school is erected and a mattam constituted": *Samantha Pandara v. Sellappa Chetti* (1).

It is, however, the rule that this property is held by the *mahant* as its owner, and the succession to him in such property follows with the succession to the office. The nature of the ownership is, as has been said, an ownership in trust for the *muth* or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning *mahant*, this trust does exist, and that it must be respected.

The question as to who has the right and office of *mahant* is one, in their Lordships' opinion, which, according to the well-known rule in India, must depend upon the custom and usage of the particular *muth* or *asthal*. Such questions in India are not settled by an appeal to general customary law; the usage of the particular *muth* stands as the law therefor.

It appears [*Mahant Ramanooj Doss v. Mahant Debraj Doss* (2)] that the *muths* are—

"of three descriptions, namely, *muroosi*, *pun-haiti* and *hakimi*, that in the first the office of chief *mahant* was hereditary, and devolved upon the chief disciple of the existing *mahant*, who, moreover, usually nominated him as his successor; that in the second the office was elective, the presiding *mahant* being selected by an assembly of *mahants*; and that in the third the appointment of presiding *mahant* was vested in the ruling power" (presumably the civil power), "or in the party who endowed the temple."

The case cited was interesting, and the report proceeds:—

"Mr. Money then directed the *pundit* of the *Sukkur Diwanny Adawlut* to state what was the law of the *shastras* in regard to the appointment of a

presiding *mahant* of a *muth* or temple called 'mouroosi'; whether the principal disciple of the last *mahant* should succeed, or whether the existing *mahant* was competent to appoint whom he pleased from among the body of his disciples?

"The reply of the *pandit* was as follows: Under the circumstances stated in the question, the principal *chela* or pupil is entitled to succeed on the death of the presiding *mahant* of a mouroosi or hereditary *muth*. If the principal pupil be personally unfit to succeed, or be disqualified by any of those causes which, according to the *shastra*s, are sufficient for such disqualification, then in that case the presiding *mahant* should, during his lifetime, select one properly qualified from among his pupils to succeed him. The person so selected will succeed."

Alongside of this report should be placed the view of Sir Charles Turner in *Samantha Pandara v. Sellappa Chetti* (1) to this effect:—

"The preceptor, the head of the institution, selects among the affiliated disciples him whom he deems the most competent, and in his own life-time installs the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the *gaddi*, and takes by succession the property which has been held by his predecessor."

Their Lordships are of opinion that the language last quoted cannot be taken in any sense as a statement of the general law of India. Any contention to that effect would indeed not be in accordance with Sir Charles Turner's own views, he having made this plain in the succeeding passage of his judgment:—

"We do not, of course, mean to lay down," said he, "that the property may not in some cases be held on different conditions and subject to different incidents."

It in short may rank as one of the varieties of circumstance and tenure whose adoption or rejection will fall to be determined by the usage and custom of the *muth*.

That this forms the controlling rule with regard to the right to the office of *mahant* may now be considered as having been conclusively settled by authority.

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(1) (1879) I.L.R., 2 Mai., 175, 179. (2) (1839) 6 S.D.A. (Beng.) 262, 268.

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In *Greedharee Doss v. Nundkissoore Doss* (1), Lord Romilly so put it, observing "that the only law of these *mahants* and their offices, functions, and duties is to be found in custom and practice, which is proved by testimony." More recent authorities, such as *Muttu Ramalinga Setuprati v. Perianayagum Pillai* (2) and *Raja Vurmah Valia v. Ravi Vurmah Kunhi Kutty* (3), confirm this proposition, with the explanation which their Lordships think it right here to repeat, given by Sir Barnes Peacock as Chief Justice of Bengal, and cited with approval in the case last mentioned to the following effect:—

"Numerous cases have been cited to show what was the usage, but the law to be laid down by this Court must be as to what is the usage of each *mahanee*. We apprehend that if a person endows a college or religious institution, the endower has a right to lay down the rule of succession; but when no such rule has been laid down, it must be proved by evidence what is the usage, in order to carry out the intention of the original endower. Each case must be governed by the usage of the particular *mahanee*."

As between the rival claimants to this *mahaniship* the situation is as follows: The plaintiff maintains the broad proposition that according to the custom of this *muth* the succession falls to the eldest or senior (that is, earliest inducted) *bairagi chela*; that it so falls as of right; and that this right of succession cannot be defeated by any deed or deeds executed by the reigning *mahan*. If this be correct there is an end to the claim, so it is maintained, of defendant No. 2.

Upon the other hand defendant No 2 maintains that there is no such absolute right of succession; that there are deeds in existence under the hand of Anand Das, the then reigning *mahan*, which transfer to and vest in him, the second defendant, the *mahaniship*; and that, the question of succession being thus

(1) (1867) 11 Moo I. A. 405, 428. (3) (1876) I. L. R. 1 Mad. 215;

(2) (1874) L. R. 1 I. A. 209, 228. I. R. 4 I. A. 76, 82.

settled, the defendant No. 2 is now in office under a right—which is not defeasible by any right in the plaintiff as alleged senior *chela*.

Their Lordships have considered deeds executed by predecessors of the parties in the years 1832, 1854, and 1866 respectively. As between the propositions (i) that the choice of the reigning *mahant* must prevail, and (ii) that the right of the senior *bairagi chela* must prevail, their Lordships are not prepared to affirm that either proposition is upon those deeds made out. In the first place, language, apparently of selection, is used; but in the second place, the person selected is in each case the senior *bairagi chela* for the time being. And there is in the evidence an apparent admission of the right of the senior *chela* to the office. Lastly, there is no instance given either in the documentary or oral evidence of a senior *chela* having been superseded by virtue of the selection of another by the *mahant* for the time being. In the view taken by their Lordships, it is unnecessary to come in this case to a decision upon this issue.

For, in their Lordships' opinion, such an issue is superseded by issues of fact. Those issues are of undoubted difficulty. They are the subject of extreme conflict of testimony. The number and width of the topics in dispute are rare even in questions of disputed fact coming from India. These topics may, however, be conveniently ranged in two divisions.

The first question is whether defendant No. 2, the nominee of Anand Das under the deeds now to be mentioned, is competent to be *mahant* of this *asthal*. This competency is challenged: if the challenge be sound he cannot succeed.

The second question is, is the plaintiff a *bairagi chela* of this *muth*? His entire life history, vouched by himself and others, is challenged as a tissue of

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falsehood. If this challenge be sound the plaintiff cannot succeed.

What would happen if both of these challenges were sound or both were unsound their Lordships need not consider, as they have come to a definite conclusion that the one challenge succeeds and the other fails.

Before, however, the investigation is entered upon, it may be convenient and proper that the following general observation should be made. Their Lordships have had the duty, in view of the reversal of the judgment of the Subordinate Judge by the High Court, of considering for themselves the entire body of the evidence in the case. They desire to record that in their opinion the Subordinate Judge has dealt with this complex and onerous case with much care, and that, although they differ from him in one or two particulars, his conclusions appear to the Board to be stated with clearness and with cogency; and they think it right also to say that there does not appear to be any ground for the reflection made in the judgment of the High Court that the Subordinate Judge has displayed in any portion of his judgment or has been in any particular moved by either partiality or bias.

Upon the first question, the objection taken to Ram Partab Singh, the second defendant, is that he is a married man, the father of a son and daughter, one at least of these children having been born since he became, or is alleged to have become, *mahant*.

This enquiry into the domestic relations of the second defendant is of course on an issue which is fundamental. For the proposition cannot be denied that, even upon the assumption that a right of selection did exist on the part of the *mahant* as among the *bairagi chelas*, the nomination must fall upon one who is

competent to hold his important sacred office. For instance, the person chosen may be disqualified by reason of bodily deformity, of bodily disease such as leprosy, of disease of the mind, or of the leading of a life which is immoral or is inconsistent with the religious vows of the brotherhood. In all such cases the nomination would be void.

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Among these disqualifications stands the contracting of marriage and the begetting of children. As already mentioned, initiation of a married man must be preceded by the entire and permanent separation from his wife and by the giving up of all worldly ties. On the question of marriage, which will afterwards be considered in this case, it is no part of the respondents' case that defendant No. 2 was once married, but had relinquished those ties. The dispute of fact to be afterwards investigated is upon the broad question of whether he ever was, or, indeed, is now, a married man or the father of children.

If this question be answered in the affirmative, disqualification attaches to that defendant; he can never be *mahant*. And the deeds appointing him to that office or giving him any administrative rights, present or prospective, with regard to the mahantship are void.

Was Ram Partab Singh a married man and the father of children?

No registers of marriages can be appealed to. The evidence given in the case is that of the plaintiff, who attended the marriage ceremony, which he describes; of Kishen Das, who also gave evidence to this effect; and of Sitabullah Das, the *mahant* of a neighbouring *asthal* of Chainpara, who lent elephants and horses for the marriage procession. There is also the evidence of other witnesses, one of whom, Ajodhya, speaks to the defendant No. 2 having a wife, a son, and a

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daughter, and swears to having seen his son some four or five years ago. There is some other evidence of a similar description. In short, if the case stood at that point, the fact of the marriage and of the existence of the wife and son and daughter would be beyond question.

Their Lordships think it necessary to advert to this further point, which is of wide significance in regard to more than the present issue. The case for the plaintiff on this topic, as on nearly all others, is stated in the evidence with complete particularity, a particularity achieved in many instances in the course of an extended and meticulous cross-examination. The date of the marriage, for instance, is given; the name of the family into which defendant No. 2 married, and of his father-in-law, together with his residence and the present residence of wife and children, all are frankly given. It is further mentioned that the ceremonial of marriage was the cause of expense to Anand Das, defendant No. 1, the then reigning *mahant*. Defendant No. 2, Ram Paṭṭab, was his nephew. All expenses were entered in the books of the *asthal*, and this expense would there appear. Furthermore, in a criminal case, to which reference will afterwards be made, it is alleged that Haman Lal, who knew the circumstance, made a statement on oath that defendant No. 2 was married. The Magistrate who tried that case stated in his judgment that an admission of the marriage was made in the course of it. An offer was made in the present case to produce a copy of the statement of Haman Lal, and that was resisted. Their Lordships are of opinion that the note of the admission made to the Magistrate in the criminal case was rightly rejected as by itself evidence of the fact recorded therein, and also that the objection of defendant No. 2 to the production of a copy of

the evidence of Haman Lal was justified in law. But the peculiarity of the case is this : Haman Lal was in court while all this was going on ; he was acting as a legal representative of the defendants ; and he was not called by them to clear up the matter, or to deny that he made the statement alleged or to explain it. Their Lordships are not surprised that that circumstance should have made a deep impression upon the mind of the Subordinate Judge as to where the truth upon this issue of fact really lay.

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The counter-case is that the whole of this story of the defendant No. 2's being a married man and the father of two children is a pure invention. The extraordinary circumstance is that, although places, events, and people have been named so openly and in such detail, and although the cross-examination on behalf of the defendants has in many instances elicited overwhelming materials for exposing the falsehoods, if they were falsehoods, none of these materials were taken advantage of, and no such exposure is attempted. No witnesses were brought from the village named to say that defendant No. 2's wife and children do not live there. Her father, who had been openly named in the plaintiff's evidence, is not cited. In short, the details elicited at great length in cross-examination of the plaintiff for the purpose of testing his evidence are left just as he has placed them, without the people whose names are put to him being brought forward to contradict in any particular the statements that he has made. To this case the answer made by defendant No. 2 is : " My father-in-law ! my wife ! my children ! no such persons exist." And the case is left there.

As to the books, they have not been produced for any period which is critical in this case. It is admitted that the manager of the *asthal*, Raghunath, was

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responsible for their custody and accuracy. Had they been produced the absence of entries in them would, if the defendants' case be true, have completely confounded the plaintiff's allegations. The story which Raghunath gives as to the books is, in their Lordships' opinion, very unsatisfactory. He says that they were destroyed or taken away by one Kamal Sahi Dewan. He assigns no possible motive for such an act; Kamal is available as a witness, and is not called.

Their Lordships do not go further into the evidence upon this subject, except to say that in face of the fact that conclusive evidence upon material particulars with regard to this issue having been available to the defendants and not led, their Lordships are not prepared to accept in lieu thereof general statements of belief on the part of other witnesses to the effect that, so far as they know, the defendant No. 2 is not a married man, and that his conduct in representing himself and acting as *mahant* proves that he is not disqualified.

Finally, upon this head their Lordships think it right to observe that upon a question of fact such as is now being investigated, the verdict given by the Subordinate Judge, who had the advantage of seeing and hearing the witnesses, cannot be lightly set aside, especially as that Judge was also presumably acquainted with the manners and customs of the people among whom such a transaction was alleged to have occurred. They must further remark that they see no sufficient grounds stated by the High Court for disturbing the verdict come to; having themselves investigated the facts, they are of opinion that the rule which applies—of attaching weight to the opinion of the Judge of first instance—cannot with safety be departed from in the present instance.

The result of this portion of the case is fatal to the claim of defendant No. 2. He cannot be *mahant*.

He was the nephew of Anand Das, the reigning *mahant*, who was apparently determined to favour him. By a will dated the 24th June, 1890, he appointed this nephew to succeed him. By a deed dated the 14th May, 1897, he resigned the office, and constituted the second respondent as his successor. And by an *ekrarnama* dated the 6th August, 1904, it was agreed between the uncle and nephew that the third respondent, another nephew and brother of the second respondent, should succeed the latter in the office of *mahant*. All these deeds, for the reason stated, are unavailing, and must be set aside.

The deeds were in themselves, it may be added, of a peculiar character. The will stated that Ram Partab Das was senior *chela* and *inter alia* was competent to "perform the sheva of Takurji." The *mahant* seven years afterwards, namely in 1897, transferred the absolute ownership of the *asthal* and all the properties and goods thereof to Ram Partab, the nephew, as *makant*, but with the reservation to Anand Das, the grantor, of an annuity of 12,000 rupees per annum, and with a declaration that Ram Partab should have— *

"no right or power to do anything without my advice and consultation with me, and shall keep himself under my governance and power in respect to the management of every form relating to the *asthal*;"

while the closing paragraph declared—

"that without my consent and sanction he shall not be competent to appoint and of his *chelas* as *mahant*."

The *ekrarnama* seven years later, namely, in 1904, went a step further. The effect of this deed was that Ram Partab was to pay Anand Das—

"any amount of money which at any time I, the first party, may require for personal expenses."

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Then occurs a clause to this effect—

"As I, the second party, generally keep unwell, therefore I, the first party, with consent of the second party, have permitted the third party (another nephew) to perform the *sraadh* of me, the first party."

The meaning of this is that, whereas according to law and custom the successor in the mahantship performs the religious rites attending the obsequies of his predecessor, an arrangement was come to by which this was avoided, and that vital rite was, so to speak, handed on past the second defendant and confided to his brother, the third defendant. Whether such a transaction with regard to a mahantship in India be competent and possible need not be determined, as in their Lordships' opinion the whole deeds are void, in consequence of the disability by marriage of the second defendant, Ram Partab. It is not unworthy of remark, however, that the fact of the marriage of Ram Partab and of this being known to Anand Das, might afford the only reasonable explanation yet offered for passing over Ram Partab, seeing that the marriage of the latter would undoubtedly have incapacitated him from performing the obsequies of his uncle. There is no evidence that Ram Partab's state of health was such as to create any incapacity. The inference, in short, is that the second defendant was married and the father of children, and that his uncle Anand Das knew it. It may be mentioned that the third defendant, it was admitted at the Bar, is dead.

The second question in the case is, accordingly, whether the plaintiff answers this description and is a *bairagi chela*. The deeds founded on by the defendants having been declared invalid, and the second defendant being incompetent to hold office, there is no dispute that the eldest or senior *chela* must succeed to the mahantship.

The plaintiff narrates the material circumstances

of his life history in his own evidence. As the Subordinate Judge observes—

"he has been cross-examined very severely for several days, and he was asked questions relating to the minutest details of the *asthal* and its people and he has acquitted himself very creditably. He knows all the *bairngis* and servants of the *asthal*; he knows every creek and corner of the *asthal* building; he describes the room of the *asthal* in which he used to live. He names the *mahants* of other *asthals*, as well as their *chelas*. He mentions the *bandars* he attended with the defendant No. 1."

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Their Lordships agree with the Subordinate Judge that no explanation has been given of the intimacy and unquestionable accuracy of the plaintiff with people, events, and affairs of the *asthal*, except upon the footing that he was initiated as one of the *chelas* thereof.

The details are briefly these. When he was about 10 years of age, the plaintiff went to bathe in the Ganges with his aunt and some women of his caste. The Ganges was only a distance of 6 or 8 miles from his native village. The story is that Anand Das had pitched his tent close to the river, and that the boy, after hearing the ringing of the bell, went and saw the idol which Anand Das had taken with him, and was asked by Lachmi Das whether he would become a *bairagi*; and that he agreed and stayed on. He was in poor circumstances, and it was a rich *asthal* into which he was to be initiated. His father a year afterwards came to the *asthal* and made enquiries, and consented to his continuing there. His initiation took place on the 4th April, 1884. He remained at the *muth* till 1889. Being then 15 years of age, he was sent to Ajodhya. In Ajodhya he received an education fitted to qualify him for his position as *bairagi chela*, including instruction in the Sanskrit language. He returned to the *muth* in 1897. In the meantime he had paid occasional visits to the *mahant* Anand Das, who had made payments of the sums required

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for his upbringing, all of which payments would, in the ordinary course, appear in the books of the *asthal*. From 1897 he remained in the *asthal* until the year 1904. In that year he was asked to sign as a witness the *ekrarnama*, which was the last of the series of documents above referred to, and under which defendant No. 2, had the mahantship confirmed to him by Anand Das, his uncle, but under the peculiar reservations and conditions already referred to, and with, so to speak, a destination over in favour of his brother, the late defendant No. 3. This was the first deed, apparently, to which the plaintiff's signature had been required.

It is beyond question that after the initiation of the plaintiff, and under what influences is not known, the defendant No. 1, Anand Das, made the resolve to attempt to bring his nephew or nephews into the succession to the mahantship, and that he was not deterred from this scheme even after he was aware that the defendant No. 2, Ram Partab, was married. The plaintiff, however, stood in the way of this scheme, and if his signature could be obtained as witness to the *ekrarnama*, this might have gone some way to the defeat of the plaintiff's rights.

Whether this story be on all points correct will never be ascertained; but this at least is true, that in 1904, just about the time when the *ekrarnama* founded on the present case was, in fact, executed, the plaintiff brought a criminal suit in respect of the assaults committed upon him on the occasion of his expulsion from the Patepur *asthal*, and the reason assigned by him for having been assaulted was the failure to sign an *ekrarnama* as a witness. The plaintiff succeeded before the Magistrate, and a conviction followed which was quashed on appeal. Their Lordships do not think these proceedings to be relevant in this case. The one

important fact is that they were taken on a ground which is referable to the execution of an *ekrarnama*, and they were taken by the plaintiff as a claimant to be a resident as of right in the *asthal*, from which he had been expelled. It should be added that the plaintiff's account of his expulsion includes this—that he was deprived of the possession of his books and papers, including all the letters received by him from Anand Das, the *mahant*, while he, the plaintiff, was absent receiving education at Ajodhya.

By accident there have, however, been found two postcards, which are produced in this case. It is not seriously contended that these postcards are forgeries. In their Lordships' opinion they are of importance. The first is dated the 6th August, 1902, and is from Sukh Deo Das to the plaintiff, addressed thus: "To Ram Parkash Das self," and the address is given, "Asthān Patepur, thana Patepur, district Mozaffarpur." The official post office stamps are: (i) "Rajnagar, 6th August, 1902"; (ii) "Mahuwa, 8th August, 1902"; and (iii) "Patepur B., 9th August, 1902." In this Sukh Das writes to the plaintiff;—

"I had told you that I would write to you in case the *Chandrīka* (a treatise on Sanskrit grammar) was being taught."

The second postcard is from Ambar Jauardan Dasji to the plaintiff, Ram Parkash Das, and to Shyam Sundar Dasji. It is dated the 14th October, 1901. The address of Ram Parkash Das is given as "The Asthan P. O. and Thana of Patepur. There are several postmarks, one of which is "Patepur." The document asks:—

"Are you prosecuting your studies or are you not? Is Shyam Sundar Das prosecuting his studies or not?"

This accordingly is evidence tending to show that the plaintiff had studied in Ajodhya; that he was known to have proceeded thence to the Patepur *asthal*,

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and that it was in that *asthal* that he had his postal address. The whole of this is inconsistent with the case of the defendants, which is a complete denial of the entire story told by the plaintiff or of the fact that he at any time was a resident, either by right or otherwise, in the Patepur *asthal*.

On this part of the case one thing is extremely suggestive,—namely, that the later postcard was addressed jointly to the plaintiff and Shyam Sundar Dasji. This *chela* was in point of fact living at the *asthal* at the time the evidence in the present suit was being taken and "for the last ten or twelve years." He was, therefore, completely at the call of the defendants, and although weeks elapsed between the time when the plaintiff gave his evidence and they were called upon to give theirs, Shyam Sundar Dasji was not produced as a witness. It must, in their Lordships' opinion, be taken that, slender as this documentary evidence is, it and the circumstance of the not calling of Shyam Sundar strongly support the case of the plaintiff and strongly rebut that of the defendants.

But the failure in the matter of evidence on the part of the defendants does not rest there; as in the case of the marriage of the defendant No. 2, so in the case of the life history of the plaintiff, the fullest details are given, many of the points being elicited by the cross-examination on behalf of the defendants. In particular the plaintiff describes his own relations, stating that his father was alive and where he resides, and with regard to the various places visited season after season by the plaintiff, materials are piled up by which his story, if inaccurate, could have been confounded. It is, however, left without an attempt to do so having been made.

On this branch of the case also the evidence of the plaintiff is believed by the Subordinate Judge. It is

supported by the evidence of Sitabullah, a neighbouring *mahant*, who swears that Anand Das initiated the plaintiff in his presence; and by that of Balkrishna Das. Both of these witnesses are also believed by the Subordinate Judge. With regard to the former no motive whatever can be suggested for his having perjured himself; and the allegation as to his having asked a thousand rupees as a bribe from Raghunath Ja, the defendants' manager, is rightly treated by the Subordinate Judge as false. It was said by Raghunath that the request was made in the presence of Gobind Das, and Gobind Das is not examined.

As to Balkrishna, he is a hemp smoker, which is not uncommon, and he is a mendicant going from place to place according to the habits of *chelas* in that part of the world. The Subordinate Judge remarks on this topic that

"the *lairagis*, it appears, are beggars no doubt, but those who are true to their cult have a regard for truth, and they cannot be easily bribed to give false evidence."

Whether this be correct or not, their Lordships do not see any grounds in the evidence given for declining to accept, as the Subordinate Judge did, the credibility of the witness.

In reviewing the evidence, the learned Judges of the High Court were greatly moved by the view which they took that the story of the circumstances under which the plaintiff was induced to attach himself to Anand Das in 1884 amounted to an allegation of kidnapping, and that the date stated for the initiation of the plaintiff would have clashed with a period of mourning for a relative of Anand Das. The date—it is many years ago—may have been erroneous by two days, and there is no reason why, if the case were false, a questionable date should have been named. The Board agrees with the conclusion of the Subordinate Judge on the point.

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The Subordinate Judge dealt lightly with the allegation of kidnapping, and in the course of his judgment made the observation that

"people of other religious denominations are now and then heard of enticing away minor children from custody of their lawful guardians for making them converts of their own faith."

This observation was unnecessary. But their Lordships are surprised to find that the High Court deals with it as if it were an attack upon Christian missionaries, and they go so far as to say that

"supposing them to be directed against Christian missionaries, they are not supported by a title of evidence, and, so far as our experience goes, they are absolutely false. In introducing them into his judgment, the Subordinate Judge does not appear to have exhibited an impartial frame of mind in treating the facts of this case."

Upon this their Lordships deem it right to observe that they think the supposition upon which this reflection proceeds to be strained, and the reflection to be uncalled for.

They incline to the view that the error on these subjects may have moved the High Court to discount improperly the true weight of the evidence, and to overlook important elements in the case.

As an instance of what their Lordships mean, it may be mentioned that the postcards are not alluded to in the judgment of the High Court, nor is the non-production of Gobind Das as a witness, nor even of Haman Lal as a witness; while, with regard to the non-production of the books, there are speculations made as to whether they would or would not have assisted in the solution of the problems arising in the case, but no due weight is attached to the serious fact that evidence, which might have concluded the case in one direction or another, and for the custody of which the defendants are responsible, has not been brought before the Court by them.

But the case of the defendants, which otherwise

would have rested on a denial by themselves and been supported by nothing more substantial than negative evidence of *mahants*, many of whom lived at a considerable distance from the Patepur *asthal*, to the effect that they did not know that the plaintiff was a *bairagi chela*, or in residence—that case is still more seriously weakened by the positive case which the defendants put forward. That positive case is as follows, namely, that the plaintiff was a *bairagi chela*, but that he did not belong to Patepur *asthal*. He belonged, so it is said, to a sub-*asthal* or sub-*muth*, consisting of a small house on a small plot of ground in the neighbourhood of Patepur, which was a separate *asthal* and had for its *mahant* one Baliram. This was an issue of fact, which fell to be proved by the defendants, and they had the materials for doing so, and at first hand. Baliram had, so the argument went, two *bairagi chelas*—one was the plaintiff and another was Manmohan Das. Their Lordships must decline to accept any hearsay evidence upon this subject, and it is sufficient to say that Baliram and Manmohan, both alive and available, are not produced as witnesses in support of the case alleged for the defendants. It is a somewhat striking fact that in the judgment of the High Court there is no reference made to this important incident.

Their Lordships think it unnecessary to investigate further the details of the evidence, being satisfied that upon it the conclusion come to by the Sub-ordinate Judge cannot be successfully challenged, and that accordingly the plaintiff has established his position to be a *bairagi chela* of Patepur *asthal*.

He is also by admission, if this be so, the senior *chela*, if not the only *chela*, who is competent to fill the office of *mahant*.

Only one other question remains. It is this:

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Anand Das is still alive. The deeds which he granted, which purported to be a transfer during his life of the mahantship to his nephews, defendants Nos. 2 and 3, are unavailing, defendant No. 2 being disqualified for the office, and defendant No. 3 being dead. In these circumstances, does the mahantship not revert to Anand Das? Anand Das is a man now nearing 80 years of age. He has for years relinquished the mahantship. Since at least 1897 he has retired from office, and has made over to defendant No. 2 all his duties together with the properties of the *asthal*. He has had a mutation of names effected in the Collector's Register in respect of the villages belonging to the *muth*. He has thus abdicated all his functions, and, as he admits, his position is no more than that of any other worshipper. The *mahant*, in their Lordships' opinion, is not only a spiritual preceptor, but also a trustee in respect of the *asthal* over which he presides. His installation of defendant No. 2 on the *gadli*, and his own retirement from the mahantship, would thus appear to have created a vacancy in the office.

But a more serious difficulty also arises from the fact that their Lordships cannot acquit defendant No. 1 of having been a party to deeds, and specially to the *ekrarnama* of 1904, which were of a nature inconsistent with his duty and position as guardian of this religious institution. To confer the mahantship upon a relation who was a married man and the father of children, was to consent to a violation in the person of the highest and most responsible officer, namely, the *mahant*, of those vows and practices of asceticism and celibacy which it was his duty as a trustee to maintain and protect. In these circumstances, their Lordships must accept the abdication which occurred as a governing fact in the case.

Further, it is not alleged that the senior *chela*, on whom even according to the defendants' case the succession would devolve in the absence of an appointment, is disqualified by any just cause from holding the office vacated by the old *mahant*. In these circumstances, their Lordships think that the plaintiff is entitled to the declaration made in his favour by the Subordinate Judge.

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Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the decree of the High Court set aside with costs, and the decree of the Subordinate Judge restored.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Barrow, Rogers & Nerill.*

J. V. W.

APPELLATE CIVIL.

Before Mookerjee and Roe JJ.

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Partnership—Contract Act (IX of 1872) s. 150—Bailor and Bailee—Either may maintain an action against a wrong-dser—What constitutes partnership—Partner entitled to purchase partnership property—Action for settled account.

A partnership is constituted whenever the parties have agreed to carry on business or to share the profits in some way in common.

Mollie, March v. Court of Wards (1), Pooley v. Driver (2) referred to.

*Appeal from Original Decree No. 59 of 1912, against the decree of A. Playfair, Subordinate Judge Silsagar dated December 1st, 1911.

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A partner is entitled to purchase partnership property provided there is full disclosure and the parties are at arm's length. It is only where the real truth is concealed and the facts are not disclosed that one partner has legitimate grievance against another.

Dunne v. English (1), *Imperial Mercantile Credit Association v. Coleman* (2) referred to.

An action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties

Rawson v. Samuel (3), *Preston v. Strutton* (4) referred to.

Section 180 of the Contract Act provides that if a third person deprives the bailee of the use or possession of the goods bailed or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case, if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Giles v. Grover (5), *Jeffries v. G. W. Railway Company* (6), *Manners v. Williams* (7) referred to.

APPEAL by Ramnath Gagoi, the plaintiff.

This appeal arose out of a suit brought by the plaintiff for the recovery of seven elephants or their value which he estimates at Rs. 11,955. The plaintiff is one Ramnath Gagoi and the defendant is the Adhikar Gossain of Garamur Satra. For the years 1909-10 and 1910-11 the Garamur Gossain purchased the lease of the Sibsagar district elephant melhals, Nos. 5 and 6. He worked the first himself. It does not, therefore, concern this suit. The second, the Gossain arranged with the plaintiff that he should superintend the working of it and receive half the profits as remuneration. The plaintiff carried on the business during the hunting season 1909-10, and 67 elephants were caught. Some of these were made over to the men who built stockades and brought the wild captured animals out

(1) (1874) L. R. 18 Eq. 524

(4) (1792) 1 Anst. 50.

(2) (1873) L. R. 6 H. L. 199.

(5) (1832) 6 Bligh N. S. 277, 452.

(3) (1839) Cr. & Ph. 161.

(6) (1456) 5 El. & Bl. 802, 807.

(7) (1849) 4 Excl. 339, 344

of the enclosures; others were sold and some were given to the Gossain at a valuation for his share of the profits. At the end of the season ten elephants remained in the plaintiff's charge—seven said to have been purchased by him, one left in his care by a man named Purandar Barua, another by Kamal Chandra Barua and yet another belonged to the defendant Gossain. This last was shortly made over to the defendant. Eventually the plaintiff sent his elephants from a camp at Ferkating near Golaghat to a place near Sibsagar named Akhoisutia. When he did this the defendant filed a petition in the Court of the Deputy Commissioner accusing the plaintiff of having removed the elephants without authority. Enquiry was made and it was found that the plaintiff's name was not registered as a lessee and, further, as he had not obtained any passes from Government for the removal of the animals, the police were directed to attach the elephants which were subsequently made over to the agents of the Gossain under an order of the Deputy Commissioner, dated 12th May 1910. Attempts at settlement proving fruitless, the plaintiff on the 1st of October 1910 commenced this action for recovery of the elephants taken away from him, or for their value. The defendant resisted the claim mainly on the ground that the plaintiff had no enforceable claim till the partnership accounts were adjusted and that if the accounts were settled, it would be found that a large sum was due from the plaintiff to the defendant. The Subordinate Judge dismissed the suit. Hence this appeal.

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Babu Tarakishore Chowdhury, Babu Braja Lal Chuckerbury, Babu Harendra Nath Ganguli and Babu Kshitish Chandra Chackravarti, for the appellants.

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Babu Biraj Mohan Mozumdar, Babu N. C. Bardcloi and Babu Prabodh Kumar Das, for the respondents.

Cur. adv. vult.

MOOKERJEE AND ROE JJ. This is an appeal by the plaintiff for recovery of eight elephants, or, in the alternative, of their price. The facts material for the determination of the rights of the parties lie in a narrow compass and may be briefly narrated. The defendant, the Gossain of Garamur Satra, took a lease from Government, of the Dayang Dhantiri Mahal No. 6 in the district of Sibsagar for the purpose of catching elephants during the years 1909-1910 and 1910-11. The license fee was Rs. 2,750 per annum. On the 3rd July 1909, the defendant took the plaintiff as a partner in the venture and the terms settled between them are set out in a letter of that date written by the defendant to the plaintiff. The contract was subsequently embodied in a formal deed of agreement executed on the 24th November 1909. The substance of the arrangement was that the plaintiff became a partner to the extent of a half share, and was authorised to manage the works, such as building stockades, catching elephants, etc. It was further agreed that at the time of the sale of the captured elephants, the plaintiff would give intimation to the defendant, so that the sale might be conducted in the presence of a representative of the latter. The plaintiff was made liable to pay a half share of the license fee in four equal instalments. The elephants were captured in five places during the first three months of 1910, Lengtha, Ringma, Bakajan, Hazak Ali stockade at Dipupani, Itonia stockade at Dipupani. Two methods were adopted for capture of the elephants, viz., Mela sikar or the noosing of wild elephants by

Mahuts mounted on tame elephants, and Kheda sikar, i.e., the driving of wild elephants into a stockade. With regard to Mela sikar, two sets of persons had interest in the elephants captured, viz., the Mahaldars or licensees from Government who had an one-fourth share and the Kunkidars or the owners of the tame elephants who had the remaining three-fourths share. As regards Kheda sikar, three sets of persons had interest in the elephants captured, viz., the Mahaldars who had one-fourth, the Gardars or builders of the stockades, who had a half-share, and the Kunkidars or owners of the tame elephants employed to take the wild elephants out of the stockade, who had the remaining one-fourth share. It is obvious from this preliminary statement that the title to an elephant captured could be transferred only with the assent of all the persons who possessed an interest in the animal. It may also be added that it is customary to allot to the lessee of the Mahal the biggest elephant caught, if the operations are exceptionally successful, and the defendant in this case was particularly anxious to secure an elephant worthy of his position. Animals were captured, as we have said, during the first three months of 1910, and the evidence shows that they were valued and sold, some to strangers, while others were taken by one or other of the parties interested in the capture. On the 28th February 1910, a tusker 6' 9" high was captured, was marched down to the Gossain as worthy of his position, and was actually delivered to him in the first week in April; its value Rs. 1,500 was debited in the account against the defendant. About this time, the defendant discovered that another tusker 8' 3" high had been captured on the 25th March in the Hazak Ali's stockade and had been marched down to the plaintiff. The defendant resented this, and he appealed to the plaintiff and his brother to let him

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have this elephant for the sake of his dignity. This request passed unheeded, and the plaintiff removed with eight of the newly caught elephants and with others belonging to himself to Akhoy Phutia about 50 miles distant from the dépôt at Yamguri, where all the captured elephants were brought. The defendant, thus baffled, sent information to the Police that the plaintiff was absconding with elephants. The result was that the Police intervened and attached the elephants; one was sold while under attachment, and seven others were made over to the agent of the defendant on the 13th May 1910. Attempts at a settlement proved abortive, and on the 1st October 1910 the plaintiff commenced this action for recovery of the elephants taken away from him or for their value. The defendant resisted the claim mainly on the ground that plaintiff had not acquired an absolute and exclusive title to the animals, that he had no enforceable claim till the partnership accounts were adjusted, and that if the accounts were settled, it would be found that a large sum was due from the plaintiff to the defendant. The Subordinate Judge has dismissed the suit. He has held that in the suit as framed, the partnership account could not be adjusted, and that till the accounts between the parties were adjusted, the plaintiff was not entitled to relief.

The plaintiff has appealed to this Court and has contested the grounds for the decision of the Subordinate Judge; he has also suggested that, if necessary, leave should be granted to amend the plaint and to convert the suit into one for partnership accounts, so that the rights and liabilities of the parties might be investigated and determined.

We may state at the outset that there is no room for controversy that the plaintiff and the defendant were partners, for as Sir Montague Smith said in

Mollwo, March v. Court of Wards (1), a partnership is constituted whenever the parties have agreed to carry on business or to share the profits in some way in common : *Pooley v. Driver* (2). What then was the position of the parties as partners in this venture ? It is plain from the evidence that the accounts of the captures in the different places were made up separately, *i.e.*, stockade by stockade. Consequently, if it be found that the accounts of one stockade have been finally settled, it cannot be maintained that the rights of the parties in the elephant captured there remained undetermined, because the accounts of some other stockade had not been finally adjusted. Now the eight elephants in dispute, as described in schedule 8 to the plaint, were captured as follows :—Four, Nos 1, 4, 5 and 8 at Rungma and Bakajan ; three, Nos. 2, 6 and 7 in the Itonia stockade ; and one, No. 3 at the Hazak Ali's stockade. As regards the Rungma and Bakajan elephants, we may state at once that the accounts were not finally settled. The oral evidence suggests that the agent of the defendant was present, made up an account and signed a book ; these are not produced by the plaintiff and Malli Ram, the agent, was, indeed, not even cross-examined with regard to these accounts. There is no trustworthy evidence to show that the prices fixed by the plaintiff for the elephants caught in these stockades were ever submitted to the agent of the defendant for approval. There are, on the other hand, indications in the evidence that the Rungma and Bakajan stockades were worked solely by the plaintiff. It is impossible for us to hold that the plaintiff had acquired sole ownership to the elephants captured at Rungma and Bakajan. This portion of the claim cannot possibly be sustained and we did

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not indeed think it necessary to hear the respondent on this part of the case.

We have next to deal with elephant No. 3 captured in the Hazak Ali's stockade and elephants Nos. 2, 6 and 7 in the Itonia stockade. In each of these cases, the evidence, in our opinion, prove that complete title had vested in the plaintiff. There was a sale in each instance with the concurrence of all the parties interested in the animal, and the price fixed was approved on behalf of the defendant by Gopal Bhuyan and Maliram Khatomia, who were unquestionably the representatives of the Gossain as contemplated by the deed of agreement. The only question is, whether the plaintiff is debarred of his remedy, because there had not been a complete adjustment of accounts. It is plain that a partner is entitled to purchase partnership property, provided there is full disclosure and the parties are at arm's length. It is only where the real truth is concealed and the facts are not disclosed that one partner has a legitimate grievance against the other: *Dunne v. English* (1), *Imperial M. C. Credit Association v. Coleman* (2). Indeed, if this principle were not adopted, the transaction might not only be fruitless, but end in loss to the parties. Elephants captured cannot be forthwith sold to strangers, and there is no reason why each partner should not be allowed to take some of the animals, if the transaction is perfectly fair, and they are agreed as to the prices. We are of opinion that the title of the plaintiff cannot be assailed merely on the ground that he has purchased partnership properties. He did so with the assent of all the persons interested in the animals, and his purchase was in no sense in contravention of the terms of the deed of agreement. Is there then any reason why the plaintiff should be denied relief, because all the

accounts had not been adjusted? The acquisition of an absolute title to the four elephants mentioned was not contingent upon the adjustment of all the accounts of the partnership. In this situation, the principle formulated by Lord Cottenham in *Rawson v. Samuel* (1) applies, viz., that an action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties. In the present case, there are not even cross-demands; the defendant has not chosen to sue the plaintiff for adjustment of the partnership accounts, and he cannot invite the Court to assume that the balance of that account would be found to be in his favour. Reference may be made to the earlier decision in *Preston v. Strutton* (2), where the pendency of an unsettled partnership account, upon which the balance was in dispute, was held to be no ground for an injunction to restrain execution upon a judgment which had been obtained upon a note given for a balance upon a former settlement. In the present case, the plaintiff had acquired a complete and indefeasible title to the elephants mentioned; he was in lawful possession of them; he was deprived of that possession, because the defendant set the police authorities in motion on untrue information and thus obtained possession of the animals. We may observe that at least as regards one of the elephants, it was argued that the evidence showed that the plaintiff was not himself the owner, as he had made the purchase for the benefit of another person. The contention in substance is that the suit in respect of such elephant could be maintained only by the person for whose benefit the purchase had been made. There is no foundation for this argument, as section 180 of the Indian Contract Act provides that if a third person

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deprives the bailee of the use or possession of the goods bailed or does them any injury; the bailee is entitled to use such remedies as the owner might have used in the like case, if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury. This is good sense and conforms to what is now well-settled law in England: Story on Bailments section 93 F; *Giles v. Grover* (1), *Jefferies v. G. W. Railway Co.* (2). As was said by Baron Parke in *Manders v. Willims* (3), no proposition can be more clear than that either the bailor or bailee of a chattel may maintain an action in respect of it against a wrong-doer, the latter by virtue of his possession, the former by reason of his property. We hold accordingly that the plaintiff is entitled to the value of the four elephants Nos. 2, 3, 6 and 7. But we are not prepared to allow him a decree for the sums claimed as expenditure for tending and training the animals: there is no satisfactory evidence in support of this claim.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified. The plaintiff will be awarded a decree for Rs. 4,600; this sum will carry interest at 6 per cent. per annum from the date of the institution of the suit to the date of realisation. We observe that the plaint does not include a claim for interest antecedent to the suit. Each party will receive and pay costs proportionate to his success and defeat in both the Courts.

S. K. B.

Decree modified.

(1) (1832) 6 Bligh N. S. 277, 452. (2) (1856) 5 El. & Bl. 802.

(3) (1849) 4 Exch. 339, 344.

LETTERS PATENT APPEAL.

Before Jenkins C. J., Mookerjee and Holmewood JJ.

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Aug. 26.

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AND

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Digwari Tenure—Digwars of Ghat Bharra in district Bankura—Appointments made by Government—Whether any relief thereto could be given by the Civil Courts—Declaratory decree, effect of.

Where the Magistrate of Bankura sanctioned the plaintiff's appointment as Digwar in succession to his deceased father, the last holder, but the Commissioner cancelled it on a misreading of the law, as to his title, and on appeal to the Government the plaintiff was directed to go to the Civil Court for relief :

Held, that the Digwars of Ghat Bharra in Bankura were the holders of an office remunerated by the enjoyment of land, and the history of the office established a general usage on the death of a Digwar holding office to appoint his heir in his place as the successor to his office.

That here the usage of the heir taking his predecessor's place could be traced back to the 17th century and so long a usage could not be disregarded as an exponent of the Digwari right. On the contrary the force of law could safely be ascribed to it, subject to the qualification that the heir's claim and tenure of office was dependent on the approval of the Government.

That the Civil Court could do no more than express its conclusion that the plaintiff was the heir of one of the last incumbents and his claim to succeed was subject to the approval of the Government, and that the ground on which the Commissioner cancelled the Magistrate's sanction was erroneous in law.

Jagendra Nath Singh v. Kalikaran Roy (1) distinguished

That in view of all the circumstances of the case, a declaratory decree

* Letters Patent Appeal, No. 1 of 1914, in appeal from Original Decree No. 298 of 1911.

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could be made defining the plaintiff's position, though it may be that it was not really necessary, for having regard to the Government's reply referring the plaintiff to the Civil Court, it would probably be prepared to give or withhold its approval in accordance with the view expressed by the Civil Court, seeing that it invited recourse thereto.

That in doing this "it was necessary" for the High Court "out of a wreckage of procedure to construct the material for a just decision" as the plaint was not happily drafted.

Cockerell v. Dickens (1), *Durga Prasad Sureka v. Bhagan Lal* (2), *Gop Narain Khanna v. Bansidhar* (3) referred to.

APPEAL under s. 15 of the Letters Patent preferred by Hemendra Nath Roy, minor, by his next friend Peru Roy, defendant No. 1.

This suit was filed by one Upendra Narain Roy son of the late Mahendra Narain Roy, one of the two Digwars of Ghat Bharra in the district of Bankura for a declaration of his right to succeed as Digwar, the Government having referred him to the Civil Court for relief when he appealed against the Commissioner's order (based on a misreading of the law) reversing that of the Magistrate sanctioning his appointment as Mahendra's heir. The Subordinate Judge of Bankura, on 24th March 1911, decreed this suit unconditionally, and, on appeal by defendant No. 1 to the High Court, that decision was affirmed under section 98 of the Code of Civil Procedure as there was a difference of opinion between Fletcher and N. R. Chatterjea JJ. Their Lordships' Judgments, dated 27th March, 1914, were as follows:—

FLETCHER J. This is an appeal preferred by the defendant No. 1 against the judgment of and decree passed by the learned Subordinate Judge of Bankura decreeing the plaintiff's suit.

The present dispute relates to the office of digwar of Ghat Bharra in the Pergana Malisara in the District of Bankura and the ghatcali lands held therewith.

(1) (1810) 2 Moo. I. A. 353, 399. (3) (1905) I. L. R. 27 All. 325;

(2) (1904) I. L. R. 31 Calc. 614; I. L. R. 32 I. A. 123.

I. L. R. 31 I. A. 122.

Neither the origin of the *jaigir*, nor the precise time at which it was created is known, but it appears that as far back as 1771 corresponding with 1178 B. S., the villages of which it was composed were held by *jaigirdars* who paid to Government $\frac{1}{3}$ ds of the annual value thereof as revenue and retained the other $\frac{2}{3}$ d as remuneration for the services under which the *jaigir* was held. The villages included in the *jaigir* were permanently settled as part of the zemindari of which the defendant No. 3 is the zemindar. In fixing the Government revenue at the time of the decennial settlement, the lands included in the *jaigir* were assessed at the $\frac{1}{3}$ ds then payable by the *jaigirdar* to the Government and the $\frac{2}{3}$ d retained by the *jaigirdar* in lieu of services formed no part of the assets of the zemindari in respect of which the Government revenue was fixed.

The above statement I take from the judgment of Their Lordships of the Judicial Committee of the Privy Council in the case of *Nilmoni Singh v. Bakra Nath Singh* (1). That decision of Their Lordships was with reference to the nature of the estate taken by the heir of a deceased *ghatwal* in lands situate in the same zemindari and Purgana as the present, and the statement is based on a report of Lalla Kanji, *tehsildar* of Pachit made on the 8th of July, 1799. This same report is a portion of the evidence in this case being marked Exhibit K.

Their Lordships also found in that case that the *jaigirdar* before them was not one of the *ghatwals* referred to in the report of Lalla Kanji as being subordinate to and paid by the *digars* out of their *jaigirs* "for they were paid by the $\frac{1}{3}$ rd of the *muzgutari* which they were allowed to retain as compensation for their services."

It is clear, therefore, that the holding of the *jaigirdars* in that case corresponds very closely to the *digars* holding in the present case.

Excluding the report of Lalla Kanji, the earliest document that we have in the present case is a document called a *hukumnama* Exhibit I (14) dated the 23rd of May, 1847. This document is addressed to Adwata Charan Rai (grandfather of the defendant No. 1) and Gour Mohan Rai (ancestor of the defendant No. 8) the then *digars* of the Purra Ghat informing them that they were not entitled to make a gift or permanent settlement of the lands but that they could only grant *pottas* limited to the period of their incumbency. The next document we have is the *swarnabali* for the year 1849 (Exhibit D). The eighth column thereof is headed "In what year, what date, what person, in whose place and in what capacity appointed temporarily or permanently" and in column 7 these remarks appear which obviously ought to have been placed in column 8. "In the year 1221, Alitya Rai was appointed in place of Naloo Rai who was dismissed. Gour Mohan Rai was appointed on the

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25th of Bhadra 1233 in place of his deceased father Anand Rai." On the 20th February, 1855, one Bistu Das Baistab presented a petition to the Magistrate charging the then *digars* with neglect of duty and other improper conduct. The Magistrate appears to have summoned the *digars* before him, for on the 10th of May, 1855, there is an order of the Joint Magistrate of Bankura dismissing Kartick Rai from the post of *sardar ghatral* and warning Muktaram Rai (who had succeeded Gour Mohan Rai) to be more careful in the discharge of his duties in the future. The order of the Joint Magistrate concluded in these words: "that notification be duly served in the *sadar* and *mofussil* for attendance of candidates for the post." Accordingly we find that the Joint Magistrate on the 21st of June, 1855 (Exhibit 92) appointed Rasik Lal Upadhyaya as *sadar ghatral* in place of Kartick Rai, Rasik Lal, however, held the post for a very short time. For it having been brought to the notice of the Commissioner that Rasik Lal was a relative of the *nazir* of the Criminal Court at Bankura and that his appointment was in breach of an order passed by the Superintendent of Police, the Commissioner directed the Joint Magistrate of Bankura to dismiss Rasik Lal and appoint some other persons in his place.

On the 14th of April, 1856, the Joint Magistrate of Bankura appointed Rajaram Rai, grand uncle of the plaintiff in the place of Rasik Lal the / dismissed *sadar ghatral*. It appears¹ from a petition (Exhibit I-19) of Manjur Ahmed, Sub-Inspector of Police addressed to the Superintendent of Police and dated 18th of July, 1869, that the Sub-Inspector reported that Kartick had rendered important services to the Police in a criminal case and suggested that Kartick should be appointed in place of "the suspended *sardar* Mahendra Narain Rai, so that he will be useful (torn) in the (illegible) case of Perpana Mahisara while public duty will be satisfactorily discharged." The Superintendent of Police forwarded this petition to the Magistrate endorsing thereon. "Forwarded to the Magistrate who is kindly requested to inform the undersigned if there is any serious objection to his being re-employed."

The Magistrate returned the petition with the following endorsement "None, but I think he should not displace the man appointed to his (post). Let him (have the next) vacancy." On the 18th of August 1869, Kartick was informed through an order of the Superintendent of Police that he would get the next vacancy.

The suspension that Mahendra was under appears to have resulted in his dismissal for Exhibit M shows that Kartick was appointed *sardar ghatral* in the vacancy caused by the dismissal of Mahendra. Mahendra appealed against the order dismissing him first to the Commissioner of the Burdwan Division who rejected his appeal (Exhibit F) and then to the

Lieutenant Governor who reversed the order of the Commissioner and directed that Mahendra should be "reinstated in service. (Exhibit 95).

It appears that in the year 1904, that the Pachit zamindari had become an encumbered estate under the management of the Court of Wards and that proceedings were being taken for the purpose of revising the assessments. Mr. Gupta, the Magistrate and Collector, had summoned 21 *ghatials* (including Mahendra) to appear before him at his camp at Nagardang.

The twenty-one *ghatials* presumably on the ground that they did not wish their assessments to be revised failed to appear before Mr. Gupta.

Thereupon by an order, dated the 19th of July, 1904, (Exhibit L(1)) Fletcher J. Mr Gupta summarily dismissed them.

There can be no doubt as regards Mahendra at least, Mr. Gupta's order of dismissal was never acted on. From a letter from Mr. Gupta dated the 6th of August 1904 (Exhibit 96) addressed to the Manager of Pachet Encumbered Estate it appears that Mahendra and the other *digars* had consented to execute *kabuliats* for the revised assessments, and that the orders for their dismissal would be cancelled in execution of the *kabuliats*. This coupled with the fact that Mahendra continued as *digar* down to the date of his death shows conclusively that Mr. Gupta's order of dismissal was never put into effect.

On the 27th of August, 1907, Mahendra presented a petition to the District Magistrate (Exhibit 98) asking that owing to ill-health he might be allowed six months' leave and that his son the plaintiff might act in his place. On the same day the District Magistrate granted Mahendra's prayer.

Before the expiry of his leave Mahendra died. The plaintiff thereupon presented a petition to the District Magistrate praying that he might be "either appointed in the said post or to be allowed time". Upon a report by the Police upon this petition, the District Magistrate passed orders that "Upendra Rai will continue to act in place of his deceased father Mahendra Narain Rai *sardar* of Bhara until further orders."

Kartik died in the year 1900, leaving his infant son, the defendant No. 1 and his widow Karunamoyi him surviving.

Shortly after the death of Mahendra, Karunamoyi acting on behalf of the defendant No. 1 presented a petition to the District Magistrate praying that in accordance with the promise made to Kartik in 1894 the defendant No. 1 might be appointed *sardar ghatial*. The District Magistrate referred this petition for enquiry and report to Balu S. C. Mukherji D. puyt Magistrate. The D. puyt Magistrate reported that Karunamoyi's petition should be rejected and that the acting *ghatial* the plaintiff should be appointed in place of his deceased father. On the 15th June 1902, the District Magistrate confirmed the report of the D. puyt Magistrate (Exhibit 129).

On appeal to the Commissioner of Burdwan Division, the Commissioner

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set aside the order of the Magistrate and directed that the defendant No. 1 should be appointed *sardar ghatcal* (Exhibit 130).

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Thereupon the plaintiff appealed to the Board of Revenue who said they had no jurisdiction in the matter and then to the Government of Bengal. On the 29th of March 1909, the Commissioner of the Burdwan Division was directed to inform the plaintiff that in the opinion of the Government of Bengal the remedy for any grievance which he may have lies in the Civil Court (Exhibit 133).

Thereupon the plaintiff filed this suit making as defendants the defendant No. 1 who is the appellant before us, the defendant No. 2, the Secretary of State for India in Council who has filed a written statement supporting the case of defendant No. 1, the defendant No. 3 the zamindar, the Raja of Pachit, the defendants Nos. 4, 5, 6 and 7, the plaintiff's brothers and the defendant No. 8 the other *digerar* of the Barra Ghat.

On the appeal before us, it has been contended on behalf of the appellant first, that the office of *sardar ghatcal* is merely a personal office held under the Government, the *ghatcal* being remunerated for his services by the profits of the lands in lieu of wages, secondly, even if the *jaigir* in the hands of Kartik was an ancient permanent heritable tenure, that upon his dismissal the tenure was forfeited and Mahendra did not hold the lands on such tenure and thirdly, that in any event, the plaintiff cannot succeed to the *jaigir* and office without the sanction of the Government.

On behalf of the respondent it has been urged that the *jaigir* is an ancient, permanent, heritable tenure to which the plaintiff on the death of his father was entitled to succeed as of right. Secondly, if the sanction of the Government was required, such sanction has in fact been given or that it cannot be unreasonably withheld and that the acts of the Executive Authorities show that the plaintiff is a fit and proper person to discharge the duties of the office, and the refusal of the Executive Authorities is subject to review by the Court.

If the various appointments and dismissals of the *digerars* stood alone there might be a good deal to be said in favour of the view that the office of *sardar ghatcal* was merely a temporary office held at the pleasure of the Government. But in this case we have the very valuable assistance of the judgment in the case of *Nilmoni Singh Deo v. Balra Nath Singh*(1) to assist us to come to a conclusion in the present appeal. But before passing to the consideration of that judgment, I shall deal with the second point urged on behalf of the appellant, viz., assuming that Kartik had a permanent heritable holding, on his dismissal the tenure was destroyed and that Mahendra got merely an office which he held at the pleasure of the Government.

I am not inclined to give much force to this argument. Kartick's father was appointed in place of a dismissed *ghatral* and presumably both Kartick's father and Mahendra were placed in possession of the *jaigir* on the same terms as the original *cigar*. This would appear to be so from the payments made by Mahendra which are proved by the evidence, for the pay of men at the Thana and documents addressed to him calling on him to perform the duties of his office. The next question is as to whether the sanction of the Government is requisite in order to enable the heir of Mahendra to succeed.

In the case of *Nilmani Singh Deo v. Bikra Nath Singh* (1), the question in dispute was whether *ghatrali* lands in the Purgana in the hands of a son, who had been appointed *ghatral* upon his father's death were assets liable for the payment of the father's debts.

The appeal, therefore, raised directly what was the nature of the interest the son of a deceased *ghatral* took in the *ghatrali* lands upon his father's death. In the course of delivering the opinion of Their Lordships Sir Barnes Peacock made the following remarks (at page 203 of the Report). "Their Lordships entertained no doubt that whether it was a *ghatrali* or not the tenure was analogous to a *ghatrali* tenure of the nature described in the preamble to Regulation XXIX (at page 206). These *jaigirs* though hereditary are not governed by the ordinary rules of inheritance under Hindu or Mahomedan Law and are subject to the condition of the Government approval of the heir" (at page 207)." In a case between the appellant and the respondent, Bakra Nath Singh, it was held that the holder of the tenure in question in that suit was not responsible for the debts of a former *jaigirdar*. The Deputy Commissioner in his judgment said "as *jaigirdar* the defendant has, what his father had, a life interest in the *jaigir*. Whether the son will succeed or not is, notwithstanding the tenure is hereditary, uncertain as he may at any moment, be dismissed from Government employ" rather he should have said "may never be sanctioned as *jaigirdar*" (at page 208) "It is quite clear that if the *jaigir* were transferable without the consent of Government either by descent to an heir or by voluntary sale or sale in execution or otherwise, there would be no security that the transferee would be a proper person to discharge the duties in respect of which lands are held at the reduced rent."

We have also been referred to the Fourth Volume of Sir William Hunter's Statistical Survey of Bengal (page 254) where it is stated that *ghatrali* lands in Bankura are neither transferable nor hereditary.

As against this the respondent relies on the judgment of Harrington and Monckyjee, JJ. in the case of *Jagendra Nath Singh v. Kal Chores Ray* (2). That was a judgment of these learned Judges on a second appeal and the report merely gives the judgment without a statement of

(1) (18-2) 1 L. R. 9 Cal. 187 (2) (18-3) 9 C. W. N. 663

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the facts or of the argument. That case came before the learned Judges on second appeal so that they were bound by the finding of fact of the lower Appellate Court, and what was apparently argued in that case was whether the dismissal of a *ghatral* when he had been acting as deputy for his father operated as a dismissal of him after his father's death. Further, the case of *Nilmoni Singh v. Deo Bakra Nath Singh* (1) was not referred to in the judgment of and presumably was not cited before the learned Judges. The case did not, therefore, purport to explain or distinguish the decision of the Privy Council and I do not think it assists us in dealing with this case of land within the Pergana Mahiara. Next it was argued on behalf of the respondent that he did in fact obtain the sanction of the Government. This it is said, is so since the Magistrate approved of Kartick acting as *ghatral* and, therefore, the Government must consider that the respondent is a person fit to discharge the duties of the Office and it is not open to the Government to disapprove of the respondent unless he is unfit for the Office.

But the words used in the judgment in the case of *Nilmoni Singh Deo v. Bakra Nath Singh* (1) are "the sanction." 'Sanction' in its ordinary signification means prior approval and implies a power to disapprove. It would be contrary to the practice in India to hold that the approval of a person to hold an appointment in an acting capacity is an approval of him for the permanent post.

Appointment of practically all posts under the Crown in India are at some time or other held by persons in what is called an acting capacity. This appears from the report in case of *Nilmoni Singh Deo v. Bakra Nath Singh* (1). The judgments in the lower Courts in that case were the decision of the Officiating Judge and a decision of a Bench of this Court one of the members of which Mr. Justice L. Jackson is described in their Lordships' judgment as the acting Chief Justice. I cannot think that the Government intended nor that the respondent thought that when the District Magistrate after the death of his father continued him in an acting capacity that he was appointed to the permanent post with sanction of the Government. Then it is said that the sanction of the Government to the respondent's appointment cannot be unreasonably withheld and that the refusal to sanction is open to review by the Court. But many reasons which may properly be considered by an Executive Officer in discharge of his duties could not be considered by a Court. Further, what are the qualifications which the Court should require a *digvar* to have, I have told you. It appears to me to be a matter solely for the Executive Authority. It was admitted by the learned Counsel for the respondent before us, that the Commissioner had power to overrule the order of the District Magistrate.

rejecting the petition of the appellant's mother and confirming the respondent in the Office. I think it must be taken that the respondent has failed to obtain the sanction of the Government which was a condition precedent to his succeeding to the ghatcals lands.

It was held in the case of *Dheo Narain Sen v. Sree Kisser Sen* (1), that the Civil Courts cannot interfere to reinstate a ghatcal who has been dismissed by the Police Authorities in the land which he formerly held as ghatcal. Apparently the same view was taken in the case of *The Secretary of State v. Poran Singh* (2). If the Authorities are correct that the Court cannot interfere to reinstate one who has actually been in possession of the ghatcals land and then dismissed, I am unable to see how the Court can interfere in favour of a person, who has never in fact been appointed as ghatcal.

In my opinion the judgment appealed against should be reversed and the plaintiff ordered to pay to the appellant his costs both in this Court and in the Court below.

N. R. CHATTERJEE J. The suit out of which this appeal arises, relates to a *digwari* tenure in the District of Bankura.

The facts appear to be these. One Kartic Roy, the father of the defendant No. 1 and his ancestors before him held the lands in dispute as Sardar Digwar of Ghat Basra in the Bankura District. Kartic Roy was dismissed for neglect of duty and improper conduct in the year 1855. Notifications were therupon issued inviting "candidate for the post" and one Basik Lal Upadhyaya was appointed in place of Kartic Roy. Basik Lal was also dismissed shortly after and on the 14th April, 1856, the Joint Magistrate of Bankura appointed Raja Ram Lal, the paternal uncle of the plaintiff's father, in his place. In 1861 Raja Ram having become incapable of performing the duties his nephew, the plaintiff's father (Mahendra), was appointed in his place. Mahendra it appears was suspended for alleged misconduct in 1869, and while he was under suspension the Police Sub-Inspector having reported that Kartic Roy since his dismissal had been useful in giving assistance to the Police, the District Superintendent wrote to the Magistrate asking him whether he had any serious objection to Kartic Roy being re-employed. The Magistrate therupon made the following order "None, but I think he should not displace the man appointed to his (torn). Let him (torn) vacancy." Kartic was accordingly informed that when any *sardari* or *sohali* becomes vacant, it will be offered to him in the first instance. Mahendra Narain was dismissed in 1870 and Kartick Roy was appointed in his place. The order of dismissal, however, was ultimately set aside by order of the Lieutenant-Governor of Bengal and

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Mahendra Narain was reinstated in the *ghatcali*. Mahendra since his reinstatement held the tenure as *ghatcal* until the 19th July, 1904, when the Magistrate Mr. Gupta, summarily dismissed him along with other *ghatwals* for failure to appear before him in connection with the revision of the assessment of their tenures. This order of Mr. Gupta, however, was not given effect to, as appears from the facts found by the lower Court and Mahendra continued to act as before. In August, 1907, Mahendra was granted six months' leave owing to ill-health and his son, the plaintiff, was approved and appointed to act in his place. Mahendra died in October, 1907, and thereupon the plaintiff presented a petition to the Magistrate praying that he might be "either appointed in the said post or to be allowed time." The Magistrate ordered that "Upendra Roy will continue to act in place of his deceased father, Mahendra Narain Rai Sardar of Barra, until further orders."

Kartick died in 1900, leaving his widow, Karunamoyi and an infant son, the defendant No. 1. In 1907 a petition was presented by Karunamoyi on behalf of her minor son the defendant No. 1, to the Magistrate praying that the defendant No. 1 might be appointed in accordance with the promise made to his father, Kartick, in 1869. The Deputy Magistrate considered the claim, of both the defendant No. 1 and the plaintiff and submitted a report to the District Magistrate who agreed with the former and held that defendant No. 1 had no right and confirmed the appointment of the plaintiff. On appeal, the Commissioner, Mr. Maldox, by his order, dated the 11th August, 1908, reversed the order of the Magistrate and held that the tenure was hereditary and that the defendant No. 1 was entitled to *ghatcali*. Defendant No. 1 was accordingly appointed *ghatcal*. The plaintiff moved the Board of Revenue but the application was rejected on the ground that that Board had no jurisdiction in the matter. The plaintiff then moved the Lieutenant-Governor of Bengal and was informed that "the remedy for any grievance he may have lies in the Civil Court." The present suit was thereupon instituted by the plaintiff.

The suit was decreed by the Court below and the defendant No. 1 has appealed to this Court. The first question for consideration is what is the nature of the tenure? Having regard to the manner in which the *ghatcali* in the present case has been dealt with by the Executive Authorities down to 1903 (the date of Mr. Maldox's order) it would seem as if it was merely a Government service held at the pleasure of the Government. But the liability to dismissal for misconduct or neglect of duty, is one of the conditions upon which a *ghatcali* tenure is held and it does not appear from the evidence on the record that any case of succession of the heir of a deceased *ghatcal* arose before the year 1908. The tenure is situate in Pargana Mahesira and within the Pachita Zemindari which at one time was included in

Birbhum. In the case of *Nilmoni Singh v. Balra Nath Singh*(1) the Judicial Committee had to consider the nature of a *jaigir* which was also situate in the same pargana and in the same zemindari. Their Lordships with reference to the *jaigir* in that case observed as follows :—“Neither the origin of the *jaigir* nor the precise time at which it was created is known; but it appears that as far back as 1771 corresponding with 1178 B. S., the villages of which it was composed were held by *jaigirdars*, who paid to Government two-thirds of the annual value thereof as revenue and retained the other one-third as remuneration for the services under which the *jaigir* was held. The villages included in the *jaigir* were permanently settled as part of the zemindari of Pachit of which the defendant (appellant) is the zemindar. In fixing the Government revenue at the time of the decennial settlement the lands included in the *jaigir* were assessed at the two-thirds then payable by the *jaigirdar* to the Government and the one-third retained by the *jaigirdar* in lieu of service formed no part of the assets of the zemindari in respect of which the Government revenue was fixed” and that the *jaigir* although not falling within Regulation XXIX of 1814 (which relates to Birbhum *ghatwali* tenure) was a tenure of the nature of those described in the preamble to that Regulation. Their Lordships held that the *jaigirs* are hereditary though not governed by the ordinary rules of inheritance and are subject to the condition of the Government’s approval of the heir.

The tenure in the present case is not a *jaigir*, but a *digwari* tenure. A *digwari* tenure, however, is similar to a *ghatwali* tenure.

The nature of *ghatwali* tenure, it is true, varies in different places and the Executive Authorities in the present case, have appointed and dismissed *ghatwals* from time to time. But the Government has the power of appointment and dismissal and notwithstanding that the said powers were exercised by the Government with reference to the *jaigir* in the case of *Nilmoni Singh* (1), the tenure was held to be hereditary. In the present case it was stated in a *hukumnama*, dated the 23rd May, 1847, that “*ghatwali* lands are held merely for remuneration for labours for the services.” But the incidents of *ghatwali* tenures such as the present do not appear to have been well understood before the case of *Nilmani Singh* was decided by the Privy Council nor are all the incidents settled by the Judicial decisions even now. The report of Lala Kauji, dated the 19th July, 1799, which was part of the evidence in and was relied upon by the Judicial Committee in that case is also part of the evidence in the present and having regard to the fact that the tenure in the present case is situate in the same Purgana and in the same zemindari as that dealt with by the Privy Council in that case and held under similar conditions, I think the incidents of the *jaigir*

(1) (1882) I. L. R. 9 Calc. 187, 200.

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laid down by the Privy Council should be held applicable to the *digvaris* tenure in the present case.

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We must take it, therefore, that the tenure is a hereditary one. But before the plaintiff can be held entitled to succeed, it is to be seen whether there was anything to prevent the defendant No. 1 from succeeding his father, Kartic, in the *ghatwali*. Notwithstanding that the tenure is hereditary, the Government has the power of dismissing the *ghatwali* for misconduct. Kartic Roy was dismissed. Now what was the effect of the dismissal of Kartic Roy? There can be no doubt that the dismissal operated as a forfeiture of the tenure so far as Kartic himself was concerned. It is contended, however, that as the tenure is hereditary such dismissal did not affect the rights of his heir. It is unnecessary to consider any usage under which the next male heir of the dismissed *ghatwali* may be appointed in his place on his dismissal because in the present case Kartic Roy presumably had no son at the time of his dismissal which took place so far back as 1855, the defendant No. 1 not being born then, as he is still a minor. A stranger to the family, *viz.*, Ilaja Ram was appointed permanently in his place and the tenure held by him has devolved on the members of his family. The question is whether under these circumstances, the defendant No. 1 can claim the tenure on the death of his father, on the ground that it is his hereditary tenure. It seems to me that the contention if given effect to will lead to anomalous results. For instance a person may be appointed *ghatwali* and dismissed for misconduct and another (a stranger to the family) appointed in his place. The latter again may be dismissed and a third one (also a stranger) appointed and so on. If the dismissal of a *ghatwali* under such circumstances, does not operate as a forfeiture of the rights of the heir, the tenure being by its nature hereditary the heir of each of the dismissed *ghatwals* on their deaths may equally claim the tenure on the ground that it is his hereditary tenure. I think, therefore, that where a *ghatwali* is dismissed and has no male member of the family fit to be appointed at the time of his dismissal there is a forfeiture of the tenure so far as his family is concerned, because the estate cannot remain in abeyance for the benefit of the heir, who may be subsequently born. And where in such a case a stranger to the family is permanently appointed in his place, I do not see how a subsequently born son of the dismissed *ghatwali* on the death of the latter and after the tenure has passed to another family, can claim it on the ground that it is his hereditary tenure. The case of *Jagendra Narain Singh v. Kali Charan Roy* (1), does not, in my opinion support the contention of the appellant. In that case it was held that the dismissal of the plaintiff, who was acting as a deputy of his father even if it was intended to operate as a dismissal of his father could not in law have

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rule the heir of the last incumbent was considered as eligible to be appointed in the place of his ancestor, unless some special ground of unfitness rendered him incompetent to perform the duties of a *jaigir*.¹ Markby J. referring to the admission of the Advocate General said "He admits that the tenure is a hereditary one unless there is some special objection to a person entitled to succeed by which I conclude is meant something which disqualifies him or unfit him for the personal discharge of the duties whatever these duties may be, but he claims for the Government, the right to appoint and the right to dismiss the *jaigirdars* a right, however, which is to be exercised as I understand it only in cases of disqualification or unfitness or in the absence of any legal heir." The Judicial Committee in that case observed as follows :— "It is quite clear, that if the *jaigir* were transferable without the consent of the Government, either by descent to an heir or by voluntary sale, or sale in execution, or otherwise there would be no security that the transferee would be a proper person to discharge the duties in respect of which the lands are held at the reduced rent. The transferee might be a person of questionable or even of bad character." The precise nature of the right of the Government or the grounds upon which the right of approval is to be exercised were not necessary to be decided and were not decided in that case. So far as can be gathered from the observations made by the Judicial Committee, the consent of the Government would seem to depend upon the question whether the heir is a proper person and fit to discharge the duties of a *ghatwal*. At any rate there is nothing in the judgment of the Privy Council to indicate that Government can disapprove on any ground it likes.

In the case of *Debse Narain Sein v. Sree Kishen Sein* (1), this Court held that the Civil Courts cannot interfere to reinstate a *ghatwal*, who has been dismissed by the Police Authorities in the land which he formerly held as *ghatwal*. But the *ghatwal* was dismissed by the Magistrate for non-performance of his services and there can be no doubt that the Magistrate has the power to dismiss a *ghatwal* for misconduct or neglect of duty. The question raised was whether the dismissal affected his right to continue to possess the *ghatwalli* lands and all that this Court said was that the Civil Court has no power to interfere with the order of dismissal and that the right to possess the lands depends on the tenure of the Office. The same observations apply to the case of *The Secretary of Stats v. Poran Singh* (2), where it was held that the dismissal of a *ghatwal* will carry with it, the forfeiture of his tenure. On the other hand in the case of *Lall Dhari Roy v. Brojo Lall Singh* (3), it was held that a Commissioner of Revenue is not warranted by law on the demise of a *ghatwal* to consider

(1) (1864) 1 W. R. 321.

(2) (1878) I. L. R. 5 Calc 740.

(3) (1868) 10 W. R. 401.

the eligibility of rival claimants to a tenure (a perpetual and descendible one) and to reject the claims of the natural heir on considerations purely moral, e.g., having evinced a want of filial respect and dutiful feeling to his father and that the plaintiff was quite competent to question the order of the Commissioner by a suit in the Civil Court. One of the learned Judges (D. N. Mitter J.) observed "A *ghatrali* tenure in Birbhum is not resumable at the mere good will and pleasure of the Executive Authorities." The *ghatrali* appears to have been a Birbhum *ghatrali*, the incidents of which were governed by the provisions of Regulation XXIX of 1814 and are not exactly those of a *ghatrali* which we are dealing with in the present case. But the *ghatrali* in the present case is analogous to a Birbhum *ghatrali* and the Government has the power of sanctioning the appointment in either case. The case cited above shows that the Government cannot disapprove of the heir on any ground it likes and apart from the question of fitness.

If we are to hold that the Government can refuse to sanction or approve on any ground it likes, what becomes of the hereditary nature of the tenure. No authority has been placed before us to show that the Government can do so on any ground and apart from the question whether the heir is a fit and proper person. So far as the particular tenure is concerned, the Authorities have appointed and dismissed *ghatralis* from time to time, but there does not appear to have been any case in which the heir of the *ghatrali* although fit has been superseded by a stranger. Once it is held that these tenures are hereditary, it seems to me that it cannot be held that the Government can withhold its sanction to the succession of the heir upon any ground it likes. No doubt it is for the Government to say whether the heir is a fit and proper person. So far as that question is concerned, the Government, I think, is the sole judge and the Civil Courts cannot go into that question. But I am unable to hold that the Government can disapprove of the heir or withhold its sanction upon any ground it likes and apart from the question whether he is a fit and proper person.

It has been pointed out on behalf of the respondent that the heir of the *ghatrali* in the case of *Jogendra Narain Singh v. Kali Charan Roy* (1), was held entitled to succeed to the tenure although he had not been approved by the Government and on the contrary had been dismissed while he was acting as deputy of his father. But the question of approval by the Government does not appear to have been raised in that case and there can be no doubt as laid down in *Nilmoni Singh v. Bakra Nath Singh* (2), by the Privy Council that the right of the heir to succeed to the *ghatrali*, is subject to the approval or sanction of the Government.

(1) (1905) 9 C. W. N. 663.

(2) (1882) 1 L. R. 9 Calc. 187.

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The next question is whether the plaintiff in the present case has been approved by the Government. It appears that in August, 1907, Mahendra Narain, the father of the plaintiff applied for six months' leave owing to ill-health and the Deputy Magistrate submitted the following note to the District Magistrate "sardar Mahendra Narain being ill he prays that his son, Upendra Narain Rai may be allowed to act for him for six months. Upendra is present and seems to be a fit person to act as sardar. Submitted to Collector for orders." The order of the District Magistrate, Mr. R Krishna on the note was approved. It is true he was appointed in an acting capacity and as deputy of his father for six months, but the fact remains that so far as the ground of fitness was concerned he was approved. After the death of Mahendra Narain the plaintiff was ordered by the Magistrate to continue to "act in the place of his deceased father, Mahendra Narain Rai until further order." Then when the matter came up before the Magistrate upon the application of the defendant No. 1, the Magistrate confirmed the plaintiff in the appointment. The above orders taken together go to show that the plaintiff was approved. The last order of the Magistrate has, no doubt, been set aside by Mr Maddox, the Commissioner, who is the higher authority, but he did not reverse the order of the Magistrate upon the ground of unfitness of the plaintiff, but merely upon his view of the legal rights of the parties and the Government of Bengal referred the plaintiff to a Civil Court. There is no suggestion in the proceedings that the plaintiff was, in any way, an unfit person and the very fact that the Commissioner considered the legal rights of the parties shows that it was on the footing that both the parties were fit to discharge the duties and were proper persons to be appointed. We have the distinct approval by the Magistrate having regard to the fitness of the plaintiff and the said finding has not up to this time been reversed by any authority. The Commissioner disallowed the plaintiff's claim merely on the ground that the defendant No. 1 was under the law entitled to succeed.

If the power of approval is to be exercised with reference to the question whether the heir is a fit and proper person, as I think it is, then the plaintiff, having regard to the above proceedings, should be held to have been approved.

I am accordingly of opinion, that the decree of the Court below is correct and should be affirmed. But in the circumstances, I think each party should bear his own costs.

As we are unable to agree in this case under Section 98, Code of Civil Procedure, the decree of the lower Court is confirmed and the present appeal dismissed, each party bearing his own costs.

Sir Rashbehary Ghose, Babu Jogesh Chandra De, Babu Jyotish Chandra Sarkar and Babu Srish Chandra De, for the appellant,

Babu Divarka Nath Chakravarti, Babu Karunamoy Bose, Babu Lalit Mohan Ghose, Babu Jyotish Chandra Hazra and Babu Sarat Chandra De, for the respondents.

Cur. adv. vult.

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JENKINS C. J. The plaintiff Upendra Narain Roy, has brought this suit to establish his claim to lands in Ghaut Bharra in the District of Bankura as held in Digwari Chakran right. The defendants are his rival claimant, Hemendra Nath Roy, the Secretary of State for India in Council and the Raja of Panchakote, the zemindar. There are also certain *pro forma* defendants of whom some are the plaintiff's brothers and one is Darpanarain Roy who is admittedly one of the two Digwars of Ghaut Bharra.

The Subordinate Judge has passed a decree in the plaintiff's favour and has directed that the plaintiff do recover possession of the land in suit, and effect has been given to this direction. From this decree an appeal to the High Court was preferred: it was heard by Fletcher and N. R. Chatterjea JJ. They were divided in opinion, and so the view of Chatterjea J. who was for confirming the decree of the Subordinate Judge prevailed.

From this judgment the present appeal has been preferred under clause 15 of the Letters Patent by Hemendra Nath Roy, who has been supported by the Raja of Panchakote, a respondent in this appeal. No one else has appeared except the plaintiff who has supported the decree in his favour.

There are two Digwars in Ghaut Bharra. The defendant Darpanarain is one and his position is not contested. The whole dispute is as to the other

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Digwar. It is common ground that the office of Digwar and enjoyment of the land go together, and this combination may be due either to a grant of land burdened with the services of the office or a grant of the office remunerated by the enjoyment of the land.

Whichever of these two it may be, we know that the office was held and the property enjoyed by Kartic Roy the defendant Hemendra's father, and seven generations of ancestors before him, and it is common ground that it was so enjoyed in a regular course of succession. Kartic, however, was dismissed in 1855 and Rasik Lal Upadhyay, a stranger to the family, was appointed in his place. But he in turn was dismissed on the 14th April 1856 and Raja Ram Rai was appointed to the office. In 1861 Raja Ram Rai became incapable of performing the duties of the post and his nephew and heir presumptive, Mahendra, the plaintiff's father, was appointed.

In the mean time the dismissed Kartic had rendered good service, and so on the 18th of August 1869 a promise was made that when any or *Sardari Sadiali* post became vacant, it should be offered to him in the first instance. In 1870, Mahendra was dismissed. In 1871 Kartic was confirmed in the vacancy caused by this dismissal and it was directed that possession would be given him of the ghatwali lands.

This dismissal however was cancelled by the order of the Lieutenant Governor who reinstated Mahendra in the service, and on the 19th June 1872 an order was made on the Sub-Inspector of Gangajalghati directing him to continue as before to get the work done by Mahendra and give him possession of the lands. From a report dated the 14th August 1872 it appears this was done.

On the 19th July 1904 the Magistrate made an order dismissing a number of Ghatwals including Mahendra.

The following month this dismissal was cancelled and Mahendra was reinstated.

In August 1907 Mahendra preferred a petition to the Magistrate praying for six months leave on the score of ill-health and asking that his son Upendra the plaintiff should be appointed in his place in an acting capacity for six months. This was approved.

On the 9th October 1907 Mahendra died and his son Upendra asked to be appointed. The order was "Upendra Rai will continue to act in place of his dead father Mahendra Narain Rai Sardar of Bharra until further orders."

I may here state that though Upendra has brothers, they do not dispute the superiority of his sole claim to the office.

In the meantime Kartic had died in 1908, leaving him surviving his widow Karunamayi and his son, the defendant Hemendra. Karunamayi, on Mahendra's death, applied for the appointment of her minor son Hemendra as Sardar Ghatwal of Pergana Mahibara. The Deputy Collector reported that "in his opinion the application should be rejected and that the present acting man Upendra Nath Rai (be) appointed in place of his deceased father, specially when he appears to have been doing good work all along."

On the 16th of Jan 1908, the Magistrate Collector made an order in which he said he thought Upendra should be confirmed. On the 14th August 1908, Mr. Maddox, the Officiating Commissioner, set aside the Magistrate's order and directed that Hemendra the minor son of Kartic be appointed as Sardar Ghatwal and until he came of age a Deputy must be appointed in his place. This opinion was based principally on Mr. Maddox's reading of a decision reported in *Jogendra Nath Singh v. Kali Charan Roy* (1).

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Upendra appealed to the Board of Revenue on the 21st September 1908, but the Board resolved that it had no jurisdiction. Thereupon Upendra appealed to the Lieutenant Governor, and in reply he was informed that the remedy for any grievance which he might have, lay in the Civil Court. So this suit was instituted by Upendra in accordance with the reply given him by the Government.

Whether we have here to deal with an office remunerated by the possession of land or land burdened with the service of an office is practically immaterial in the view I take.

But such materials as there are on the record, in my opinion, support the conclusion that we have here an office remunerated by the possession of land. Most of the information we possess relates to the period subsequent to Kartic's appointment, but it does appear that one of his predecessors was dismissed. Since that time, there have been the repeated instances of appointment and dismissal which I have already mentioned, and what has given them the greater significance is that the corresponding possession of the land has apparently followed as a matter of course.

The oral evidence on this point is interesting. Thus Upendra says, "From 1856 up to the time of my dismissal we have held the post of Sardar Digwar and held possession of the properties appertaining to the office. No person was appointed in my father's place and our possession did not cease."

Later he deposes, "when a new Sardar is appointed, he has to take possession through the police; when I was appointed acting Sirdar, I did not apply to be put in possession. The possession was then with us." And according to him, it is the Magistrate who appoints and dismisses. Darpanarain declares that he took possession through the police on his appointment.

and that when a Sardar is appointed permanently or in an officiating post, he has to take possession through the Police.

Beni Madhab, the police Sub-Inspector at Gangajal-ghat, says that the Magistrates dismiss for misconduct or default in the performance of their duties, and that the Police give possession to the person who is appointed. Rakhal Chandra Chattopadhyay deposes to this power of dismissal.

Prasanna Kumar Rai, who looks after Hemendra's affairs, declares that the Magistrate appoints and dismisses and that he had never seen any Digwar or Sardar hold possession of the lands of his office after dismissal.

This view is borne out by the documentary evidence. The earliest document is the report submitted in 1799 by Kunji Tahsildar of Chakla Pachet, but his covering letter shows that his sources of information were limited. The report throws no appreciable light on the question now under discussion, and it is probable that the distinction it involves was not present to his mind. But for what it may be worth, we find him stating that the Digwars enjoy their jagir villages without payment of rent in lieu of their wages.

The order of the 23rd May 1847 is much more explicit, and the parwana there reproduced states that ghatwali lands are held merely for remuneration for labours of their services, and that they are not entitled to make a permanent settlement of the lands to any one by giving up their rights thereto, that they can grant only a patta of jote right for the period of their incumbency.

Another document to which reference may usefully be made is Exh. D, an attested copy of *isamnabisi* or list of Ghatwals dated in the year 1849. It is expressed to be an *isamnabisi* of ghatwals who got their allowance in cash or got jaigiri lands therefor.

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It refers to the subject-matter of the present litigation, and one of the columns is headed "whether the Sardar gets pay in cash or holds chakran lands." In another column we find the following statement. "In the year 1221, Aditya Rai was appointed in place of Madan Rai who was dismissed. Gour Mohan Rai was appointed on the 25th Bhadra 1238 in place of his deceased father Anand Rai. Jagat Sankar was appointed in place of his deceased brother Ananda Sarkar on the 26th Bhadra 1235."

The conclusion then to which I come is that the Digwari position was that of an office remunerated by the enjoyment of land. So the next point for determination is, whether this office is hereditary or not. No Sanad is forthcoming, but the history of this office establishes a general usage on the death of a Digwar holding office to appoint his heir in his place as the successor to his office. Whether the office thus became hereditary in the strict sense of the term, may be open to discussion, for even in the case of life grants it is a common practice that they should be renewed to the heir of the grantee, so that there may be by usage an appearance of descent, and it may always be a matter of some doubt at what point the principle and practice of identification can be properly regarded as establishing heritability. Here the usage of the heir taking his predecessor's place can be traced back to the 17th century, and so long a usage cannot be disregarded as an exponent of the Digwari right. On the contrary, I think, we may safely ascribe to it the force of law, subject to the qualification, that the heir's claim and tenure of office is dependent on the approval of the Government. Mr. Maddox's determination recognises this, for he clearly thought that he was passing judgment on conflicting legal claims, and it is difficult to reconcile the Government's reply with any

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Commissioner cancelled the Magistrate's sanction was erroneous in law.

We cannot therefore affirm the decree as it stands so that we have to see, whether it is open to us to pass a decree which will embody what is essential in this conclusion. The plaint is not happily framed, but in view of all the circumstances of the case, I think we can make a declaratory decree, defining the plaintiff's position, though it may be it is not really necessary, for having regard to the Government's reply referring the plaintiff to the Civil Court, they would probably be prepared to give or withhold its approval in accordance with the view we have expressed, seeing that it invited recourse to the Civil Court. For the appellant, it is objected that we cannot make a declaratory decree on a plaint framed as the present is, and we have been referred to the decision in *Walihan v. Jogeshwar Narayn* (1). But that decision does not appear to me to govern the present case, which is peculiar in its circumstances. The prayers in the plaint are not limited to a claim for possession but seek declaration, and though the form in which these declarations are sought do not comply strictly with the provisions of section 42 of the Specific Relief Act, the prayers, more specially in view of order VII rule 7 are, I think, sufficiently comprehensive to permit the decree I think should be passed.

In dealing with this matter on broad lines, we shall be acting in accordance with what has been done by their Lordships of the Privy Council in more than one case when, to use an expression employed on one occasion, it was necessary out of a wreckage of procedure to construct the material for a just decision.

The principle adopted by their Lordships in

(1) (1907) I. L. R. 35 Calc. 189; L. R. 35 I. A. 33.

Cockerell v. Dickens (1) is this: "The rule is that if the bill contains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert specific relief prayed, and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill will consistently with the rules of the Court maintain that relief." And the same position was maintained in *Durga Prasad Sureka v. Bhajan Lall* (2) and *Gopi Narain Khanna v. Bansidhar* (3).

We must, therefore, modify the decree of the lower Court by substituting for the same a declaration that, according to usage, on the death of a Digwar of Ghat Bharra, holding office, his heir may be appointed in his place, if the Government approve, that Mahendra Narain Roy held the office of Digwar at his death and that the plaintiff is the heir of Mahendra Narain Roy. This Court cannot give relief either by appointing him to the office he seeks or delivering him possession of the land appertaining thereto. That relief must be sought elsewhere and possibly for this purpose the declaration may be of service.

In the circumstances of this case, each party should bear his own costs throughout.

MOKERJEE J. This is an appeal by the first defendant in a suit commenced by the plaintiff respondent for recovery of possession of land on declaration of title thereto as Digwar of Ghat Bharra in the District of Bankura. The suit was decided by the trial Court. Upon appeal to this Court, the Judges of the Division Bench were equally divided in opinion.

(1) (1840) 2 Moo. I. A. 353, 389. (3) (1905) I. L. R. 27 All 325.

(2) (1904) I. L. R. 31 Calc. 614; I. L. R. 32 I. A. 123

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Fletcher J. was of opinion that the decree of the Subordinate Judge should be reversed and the suit dismissed. N. R. Chatterjea, J., was of opinion, on the other hand, that the decree should be confirmed. Consequently the decree of the Subordinate Judge stood confirmed under sub-section 2 of section 98 of the Code of Civil Procedure of 1908. On the present appeal under clause 15 of the Letters Patent, the decision of the Subordinate Judge has been assailed principally on the ground that the plaintiff cannot claim as of right to succeed to the office of Digwar and that as the Executive Government have refused to appoint him as Digwar, the Civil Court has no jurisdiction to review the order of the Executive.

It is desirable at the outset to state that no useful purpose is likely to be served by a reference to the provisions of Regulation XXIX of 1814, which are applicable to Birbhum Ghatwals; nor can any analogy be safely drawn from the decisions in *Nilmoni Singh Deo v. Bakranath Singh* (1) and *Jogendra Narain Singh v. Kali Charan Roy* (2) which are mentioned in the judgments of the Division Bench. As was observed by their Lordships of the Judicial Committee in the case of *Ram Chunder Dutt v. Jugtes Chunder Dutt* (3), the argument from analogy may arise where a principle of law is involved, but where Courts are dealing with the positive enactment of a statute reasons founded upon analogy are scarcely applicable. This observation is peculiarly weighty where the rights of the parties litigant depend in a great measure upon the nature of the particular tenure or the terms of the particular grant. The problem for investigation, consequently, is, what is the nature of the tenure, what are the terms of the grant in this

(1) (1882) I. L. R. 9 Calc. 187, 200.

(2) (1905) 9 C. W. N. 663.

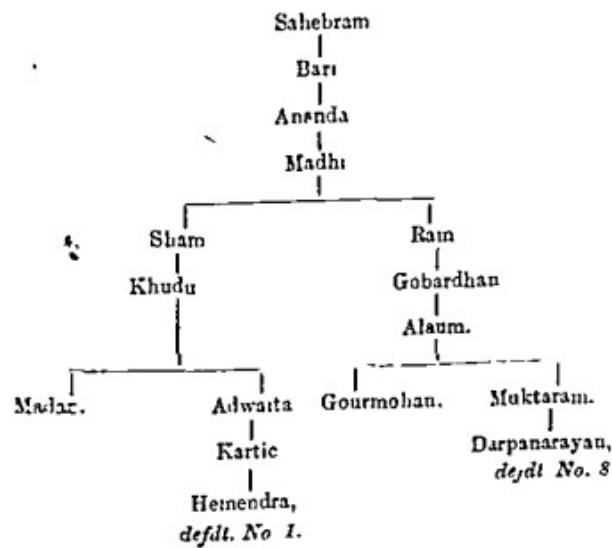
(3) (1873) 12 B. L. R. 229:

19 W. H. 353.

case as indicated by its antecedent history. In the determination of this question, we must bear in mind the clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands. This fundamental distinction was emphasized by Jackson J. in *Kooldeep Narain Singh v. Mahadeo Singh* (1), and has since then been recognised and approved by the Judicial Committee in *Forbes v. Meer Mahomed Tuqee* (2), *Lilanund Singh v. Munoranjan Singh* (3), and *Venkata Narasimha v. Sobhanadri* (4).

In the investigation of the nature of the title, under which the lands in dispute have been held by successive occupants thereof, reference to the following genealogical tables will be found convenient :

(A)



(1) (1866) 6 W. R. 199, 209

(2) (1870) 13 Moo. I. A. 438, 464

(3) (1873) 13 B. L. R. 124, 131

(4) (1905) I. L. R. 29 Mad. 52

L. R. 33 I. A. 46, 52

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Rajaram.

It is undisputed that the lands in suit were held by successive Digwars of Ghat Barrah, who were up to the middle of the Nineteenth Century, members of the family whereof Sahebram was the founder. The evidence indicates that Sham and Ram were Digwars in 1782. Since then, the lands have been enjoyed in equal halves by the two Digwars, one of whom came from the branch of Sham and the other from the branch of Ram. We are not concerned in this litigation with the lands enjoyed by the Digwars who belong to the latter branch, but the evidence indicates that Gour Mohan was appointed Digwar in 1831 and that Darpanarayan succeeded him in 1865. When we turn to the history of the other branch, we find that Madan, who was Digwar in 1808, was dismissed in 1814 and was succeeded by Adwaita, who in his turn was dismissed in 1850. Kartic was appointed Digwar on the 28th March 1851 after the dismissal of his father and was himself dismissed on the 10th May 1855, as the authorities were not satisfied with the manner in which he discharged the police duties. On the dismissal of Kartic, a stranger to the family, named Rasik Lal Upadhyay, was appointed Ghatwal, but his tenure of office was very brief, as he himself was dismissed on the 14th February 1856. On the dismissal of Rasik, Rajaram the grand uncle of the plaintiff who belonged to a different family, was appointed Digwar on the 14th April 1856. He was succeeded in 1861 by Mahendra, the father of the plaintiff. During the incumbency of Mahendra, Kartic, in 1869, made a

successful attempt to get back the office when Mahendra was suspended. On the 13th October 1870, Mahendra and Darpanarain were both dismissed, as their conduct was deemed unsatisfactory and the opinion was expressed that it was improper to keep such men in Government service. Kartic was re-appointed Digwar in place of Mahendra on the 11th January 1861, and one Khetra Nath was, at the same time, appointed in place of Darpanarain. But on the 5th May 1872, Mahendra and Darpanarain were both reinstated by the Lieutenant-Governor in supersession of the order of the Commissioner who had confirmed the order of dismissal made by the Magistrate. This terminated the brief restoration of Kartic to the office which had been held by his ancestors for seven generations, but he obtained, what may be described, as a promise of reappointment on a future vacancy. Kartic, however, died in 1900, leaving an infant son, Hemendra, the first defendant in this litigation. On the 19th July 1904, Mahendra was dismissed again by the Magistrate along with a number of other persons similarly situated. On the 6th August 1904, this order was revoked, and Mahendra and Darpanarain were conditionally restored. The evidence points to the conclusion that they were allowed to continue in office and enjoy the lands, though the condition imposed does not appear to have been fulfilled. On the 20th August 1907, Mahendra obtained leave of absence on the ground of illness and his son Upendra was appointed to act for him; but Mahendra never returned to his work, as he died on the 9th October 1907. Upendra was thereupon directed to act until further orders. At this stage, an attempt was made by the guardian of Hemendra to secure the office and the lands for him, if possible. The Magistrate, however, on the 16th June 1908, appointed Upendra

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as Digwar on the strength of a report, dated the 27th April 1908, submitted by the Deputy Magistrate. But on appeal to the Commissioner the order of the Magistrate was reversed on the 11th August 1908 and Hemendra, the infant son of Kartic, was appointed Digwar. Upendra preferred an appeal to the Board of Revenue which was dismissed on the 21st September 1908. He then appealed to the Lieutenant-Governor; but on the 29th March 1909, he was informed that the remedy for any grievance which he might have lay in the Civil Court. The result was the institution of this suit by him on the 16th August 1909.

From the facts thus briefly narrated, two points emerge as perfectly clear, namely, *first*, that the disputed lands have always been enjoyed by the Digwar of Ghat Burrah; and, *secondly*, that when a person has been dismissed from the office of Digwar, he has been forthwith deprived of the lands. There is, indeed, no trace in the evidence that there ever was an assertion by a dismissed Digwar that he was not liable to be deprived of the lands. As regards the dismissal itself, the Digwar was at liberty to appeal from the decision of the Magistrate to the superior authorities, but no one has ever suggested that if the Executive Government ultimately confirmed the order of dismissal, the Digwar had still a right to continue in possession of the lands. These circumstances, in my opinion, justify the inference that we have here, not a grant of lands burdened with a certain service, but the grant of an office the performance of whose duties is remunerated by the use of lands. The land and the office went together, but the office was the primary concern, the occupation of the land was subsidiary thereto. I think the inference is also legitimate that we have here a case, not of property held by a man to himself and to his heirs, but of

property held by a man to himself as holder of an office and his successors in that office. The office itself was not hereditary in the sense that the heir of the last holder was entitled as a matter of right to discharge the duties of the office and to remunerate himself from the usufruct of the land attached thereto. The theory that the office was hereditary in character is inconsistent with incontrovertible facts disclosed in the evidence. Successive Digwars were dismissed by the Executive Government, on the ground that they were not fitted to hold the office, without any question or demur. In 1855 the office was granted to a stranger to the family of Kartic, and when the new Digwar was in his turn removed a few months later, another person, Rajaram, who was a stranger to both the families, was appointed; it was then expressly stated as a point in his favour that he was not connected with Kartic. The view that the Digwar was liable to be removed for failure to discharge his duties satisfactorily and that on his removal the Executive Government was free to appoint a qualified stranger as successor, is borne out by the documentary and oral evidence on the record.

The earliest document, namely, the report of Kanji Talsildar, dated the 9th July 1799, though based on meagre material, makes it reasonably clear that the Digwars enjoyed the villages without payment of rent in lieu of their wages. Evidence of a more recent date is consistent with this position, for instance the order on Adwaita and Gour Mohan, dated the 23rd May 1817, states explicitly that the Digwars held lands merely for remuneration for the labours of their services and are consequently competent to create only such subordinate rights as do not continue beyond the period of their incumbency. The list of Ghatwals framed in 1849 makes it equally clear that the Digwars,

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when they did not get their allowance in cash, held the lands only in lieu of such allowance; and this was applicable to the Digwari now in suit. The same view is supported by subsequent reports and orders made on the occasion of dismissal of successive Digwars and the appointment of their successor, and this is confirmed by the statement of the plaintiff himself as to the nature of the tenure of the Digwari office made in an agreement between himself and his brother on the 1st April 1908. The position, consequently, is that the disputed lands appertain to the office of Digwar of Ghat Burra, that the office itself is not hereditary as a matter of right, that the holder of the office is liable to be removed for failure to discharge his duties to the satisfaction of the Executive Government, that on the removal of a Digwar his successor acquires a valid title to the office only if appointed thereto by the Executive Government, and that although on two occasions strangers have been appointed to this office, during many generations, the heir to the last holder has taken the office and the lands with the approval of the Executive Government.

Tested in the light of these conclusions, what is the position of the plaintiff? He has not been appointed Digwar by the Executive Government and he had not consequently a valid and enforceable title to that office at the time of the institution of the suit. He is plainly not entitled to a decree for possession of the lands annexed to that office and the decree of the Subordinate Judge cannot, to this extent, be possibly confirmed. But it does not follow that the plaintiff is not entitled to any relief in the suit as framed, and here we must take into account the very special circumstances which have preceded its institution. The plaintiff, on the death of his father, was appointed Digwar by the Magistrate. But the order of the

Magistrate was reversed on appeal by the Commissioner. The decision of the Commissioner was largely based on a misapplication of the judgment of this Court in the case of *Jogendra Narain Singh v. Kali Charan Roy*(1). That decision, it has not been seriously disputed before us by either party, has no possible application to this case. There the Court found that the particular tenure was not merely heritable but was also permanent, and that a tenure of this description could not be determined or resumed by the Zemindar or the Government on the ground that the services were no longer necessary or had been dispensed with. It was further held that in the case of a tenure of this description, where, during the lifetime of the Ghatwal, his son who was appointed his deputy, was dismissed, the dismissal of the son did not amount to a dismissal of the father, and that after the father's death, the son was entitled to succeed, although during his father's lifetime he had been dismissed while acting as a deputy of his father. It is obvious that these principles have no application to a case where, as here, the tenure is not heritable as of right, and the lands are annexed to an office which also has not a hereditary character impressed upon it. The position then is, that the Commissioner refused to approve the appointment of the plaintiff as Digwar, not because the Commissioner considered him unsuitable for the office, but because the Commissioner took an erroneous view of the relative rights of the plaintiff and his opponent; the determination of the Commissioner was in essence based upon an erroneous adjudication of a question of title. This explains why the Board of Revenue stated that the Board had no jurisdiction and why the Executive Government held that

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the remedy for any grievance which the plaintiff might have, lay in the Civil Court. It need not be denied that, as was recognised in *Debee Narain Sein v. Sree Kishen Sein* (1) and *The Secretary of State v. Poran Singh* (2), the Civil Courts have no jurisdiction to reinstate a Ghatwal who has been dismissed by the Executive Government as unfit for the discharge of his duties. But the position is obviously different, where the Commissioner decides against a claimant, not in the exercise of his discretion but upon an erroneous view of the relative title of his contestant: *Lal Dharee Roy v. Brojo Lall Singh* (3). I am of opinion, accordingly, that it is competent to this Court to grant to the plaintiff relief by way of a declaratory decree under section 42 of the Specific Relief Act, so that the plaintiff may approach the Executive Government and seek their decision on the question of the appointment of a successor to the office of Digwar of Ghat Burra. A similar view has been taken in Bombay in connection with what are known as Vatans, and it has been ruled that if the plaintiff has the right and if the Court has jurisdiction to give him relief by declaring it, he is entitled to a decree; the Court is not concerned with the object or motive of the party who comes into Court in assertion of his alleged right, and he should not be refused declaration merely because he seeks it with a view to influence the opinion of the Revenue authorities [*Ramchandra v. An'nt Sat* (4), *Govind v. Bapuji* (5), *Rahim Khan v. Dada Miya* (6)]; but the position is different when the declaration sought can be based only on the investigation of a question which is by statute or otherwise expressly excluded from the cognizance of the Civil Court: *Khandova v.*

(1) (1864) 1 W. R. 321.

(4) (1883) I. L. R. 8 Bom. 25.

(2) (1878) I. L. R. 5 Calc. 740.

(5) (1893) I. L. R. 18 Bom. 516.

(3) (1868) 10 W. R. 401.

(6) (1909) I. L. R. 34 Bom. 101.

Apaji (1), *Chinto v. Lakshmi Bai* (2), *Balkrishna v. Balaji* (3), *Raoji v. Genu* (4), *Jivaji v. Fakir* (5). The view I take is supported by the decision of the Judicial Committee in *Sadut Ali v. Khajeh Abdool Gunney* (6), which recognised the principle that before the Court grants relief in a declaratory suit, the Court must see that the declaration of right may be the foundation of relief to be got somewhere. This condition, it appears to me, is sufficiently answered in the present case. I arrive at this conclusion without hesitation or embarrassment in view of the letter of the Government of Bengal dated the 29th March 1909.

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The only other question for consideration is, whether a declaration should be granted in the suit as framed. Here I think the Court should be guided by well settled principles now embodied in rule 7 of Order VII of the Code of 1908. The principle is best stated in the words of Lord Erskine in *Hiern v. Mill* (7). The rule is that if the bill contain charges putting facts in issue that are material, the plaintiff is entitled to relief which those facts will sustain under the general prayer, but he cannot desert specific relief prayed and, under the general prayer, ask specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the Rules of the Court, maintain that relief. This formulation of the rule, it may be parenthetically observed, is attributed *per incuriam* to Lord Eldon by Baron Parke in *Cockerell v. Dickens* (8). In the application of this statutory rule, the test is whether the defendant will be taken by surprise: *Stevens v. Gappy* (9); and there can be no surprise if the deficient relief not specifically

(1) (1877) I L. R. 2 Bom. 370.

(5) (1912) 14 Bom. L. R. 395.

(2) (1878) I. L. R. 2 Bom. 375.

(6) (1873) 11 B. L. R. 203.

(3) (1884) I. L. R. 9 Bom. 25.

(7) (1805) 13 Ves. 114, 119.

(4) (1890) I. L. R. 22 Bom. 344.

(8) (1840) 2 Moo. I. A. 353, 339.

(9) (1826) 3 Russell 171, 185

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claimed, but supplied as the Courts think just, is consistent with the relief specifically claimed as well as with the case raised by the pleadings: *Cargill v. Bower* (1). This rule has been repeatedly recognised and approved by the Judicial Committee: *Cockereil v. Dickens* (2), *Durga Prosad v. Bhajan Lal* (3), *Gopi Narayan v. Bansidhar* (4). The decision in *Walihan v. Jogeshwar* (5) is not really opposed to this view and only illustrates the position that to entitle a plaintiff to judgment under the claim for general relief, different from that specifically claimed, the allegations relied upon must not only be such as to afford a ground for relief claimed, but they must have been introduced for the purpose of showing a right to relief and not for the mere purpose of corroborating the plaintiff's right to the specific relief claimed. In the case before us, the nature of the title under which the disputed property is held has been investigated after a protracted trial, and there is no room for suggestion that the defendant will be taken by surprise if a declaratory decree is made in favour of the plaintiff. I hold accordingly that this is a case where a declaratory decree may properly be made, and I agree with the Chief Justice that this appeal should be allowed and the decree of the lower Court modified by the substitution of a declaration in the terms framed by him.

HOLMWOOD J. I have nothing to add to the judgments which have just been delivered and with which I agree.

G. S.

Appeal allowed; decree modified.

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| (1) (1878) 10 Ch. D. 503, 508. | (4) (1905) I. L. R. 27 All 323; |
| (2) (1840) 2 Moo. J. A. 353, 389. | L. R. 32 I. A. 123. |
| (3) (1904) I. L. R. 31 Calc. 614; | (5) (1907) I. L. R. 35 Calc. 189; |
| L. R. 31 I. A. 122. | L. R. 35 I. A. 38. |

APPELLATE CIVIL.

Before Richardson and Imam JJ.

PRASANNA KUMAR DUTT

v.

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Nov. 26.

Sale for Arrears of Revenue—Adverse possession—Limitation—Incumbrance—Limitation Act (IX of 1908) Sch. I, Arts. 121, 142, 144—Assam Land and Revenue Regulation (I of 1886) ss. 70, 71.

In a suit for *khas* possession and mesne profits in respect of certain lands purchased by the plaintiff at a sale for arrears of Government revenue, the defendants contended that they had been in adverse possession of the said lands for a long time; that their occupation was in the nature of an incumbrance and that the plaintiffs were not entitled to avoid the same —

Held, that the interest which the defendants acquired was an incumbrance within the meaning of Article 121 and the suit was barred by limitation.

Karmi Khan v. Broj Nath Das (1) and *Naffer Chandra Pal Chaudhry v. Rajendra Lal Guarami* (2) approved.

Kumar Kalanand Singh v. Syed Sarafat Hossem (3) and *Rahimuddin Munshi v. Nalini Kanta Lahiri* (4) distinguished.

SECOND APPEAL by Prasanna Kumar Dutt Purkayastha, the plaintiff No. 1.

This appeal arose out of a suit brought by the plaintiff No. 1 and others for the recovery of *khas* possession of certain lands, namely, the whole of plot No. 1 and the half of plot No. 2 appertaining to *taluk* Krishna Ram No. 27, situate in *pargana* Atuajan and

* Appeal from Appellate Decree, No 2119 of 1912, against the decree of Kailash Chandra Sen, Subordinate Judge of Sylhet, dated April 15, 1912, affirming the decree of Surendra Nath Sen, Munsif of Sonamganj, dated July 10, 1911.

(1) (1894) I. L. R. 22 Calc. 244

(3) (1903) 12 C. W. N. 528

(2) (1897) I. L. R. 25 Calc. 167.

(4) (1910) 13 C. W. N. 407

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for the recovery of mesne profits in respect of those lands. On the 6th January, 1897, one Brojonath Chaudhury purchased the said *taluk* at an auction sale for arrears of Government revenue under the Assam Land and Revenue Regulations, 1886, and, thereafter, entered into a contract with the plaintiffs to sell the same to them. This contract was subsequently enforced by a suit, and the plaintiffs received from the Court in August, 1907, a *kobala* in respect of the said *taluk*. On receipt of the *kobala* the plaintiffs demanded a *kabuliyat* from certain persons who were in possession of the plots Nos. 1 and 2, but the latter denied the plaintiffs' title to the said plots and refused to grant them the *kabuliyat*. Thereupon, the plaintiffs filed this suit on the 9th June, 1909. The principal defendants contended *inter alia*, that they had been in possession of the lands in dispute for a long time adversely to the plaintiffs, that their occupation of the said lands was in the nature of an incumbrance, and that the plaintiffs were not entitled to avoid the same. Both the Courts below having dismissed this suit, the plaintiff No. 1 appealed to the High Court.

Babu Jaijunath Kunjilal and *Babu Birendra Chandra Das*, for the appellant.

Babu Hemendra Kumar Das, for the respondents.

RICHARDSON AND IMAM JJ. In this case it is conceded that the revenue sale of 1897, under which the plaintiff appellant claims, became final and conclusive more than twelve years before the date on which the suit was instituted. That being so, we may accept the contention of the appellant's learned pleader that the finding in the judgment of the lower Appellate Court that the principal defendants were in occupation of the lands in suit as trespassers for more than twelve years refers to adverse possession before the sale. Assuming

this in the appellant's favour, the appeal may be decided on a very short ground. The question is one of limitation. Is or is not Article 121 of the second schedule to the Limitation Act applicable to this case? It is applicable if the nature of the interest acquired by the principal defendants by adverse possession is an "incumbrance" within the meaning of the word as it is there used. It is a question of terminology? Is such an interest properly described as an incumbrance? It seems to us that in view of the decisions of this Court in *Karmi Khan v. Brojo Nath Das* (1) and *Nuffer Chandra Pal Chowdhry v. Rajendra Lal Goswami* (2), and of the earlier authorities which were cited and followed in those cases, the questions which we have stated can admit only of an affirmative answer. The learned pleader for the appellant contends that the interest is not an incumbrance and cannot properly be described as such. He refers to the cases of *Kumar Kalanand Singh v. Syed Sirafat Hossein* (3), and *Razi-nuddi Munshi v. Nalini Kanta Lahiri* (4). No doubt in those cases, it seems to have been held in regard to section 54 of the Bengal Land Revenue Sales Act (XI of 1859) that in the expression "subject to all incumbrances" which there occurs, the word "incumbrances" does not include an interest acquired before the date of the sale by adverse possession for the statutory period. On the other hand, it has always been held that the word as used in section 37 where the expression is "free from all incumbrances" includes such an interest at any rate for the purposes of Article 121, and this point as to the meaning of the word in that Article was not considered in the two cases reported in the Calcutta Weekly Notes.

- (1) (1894) I L. R. 22 Calc. 244. (3) (1908) 12 C. W. N. 528.
 (2) (1897) I. L. R. 25 Calc. 167. (4) (1909) 13 C. W. N. 407.

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In the present case the sale took place not under Act XI of 1859 but under the Assam Land and Revenue Regulation of 1886. We assume again in the appellant's favour, that the learned Subordinate Judge misapplied section 71 of the Regulation and that the sale was the sale of an estate under section 70. But the interest which the defendants acquired is in our opinion on the authorities an incumbrance within the meaning of Article 121 and the suit is barred by limitation. The contention of the learned pleader for the appellant that under Art. 142 or 144 the period of limitation was twelve years from the date when possession was formally given to the purchaser at the sale cannot be accepted.

We may mention that there are two plots in dispute in this suit. The plaintiffs' title to the first plot fails on the facts found by the Subordinate Judge, which cannot be now successfully assailed. His title to the one-half share of the second plot fails on the ground we have indicated.

The result is that the appeal must be dismissed with costs.

O. M.

Appeal dismissed.

APPELLATE CRIMINAL.*Before Holmwood and Mullick JJ.***KRISHNA GOVINDA PAL**

v.

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Dec. 7.**EMPEROR.***

Forgery—Certified copy, filing of, whether user of forged document, if original be forged—Evidence of intention—Penal Code (Act XLV of 1860) ss 466, 471

A series of similar transactions which are not the offence charged can only be used as evidence of the intention of the person who forged the document and not as evidence of forgery.

It is extremely doubtful whether the mere filing of a copy is the user of a forged document. A certified copy thereof is certainly not a forged document.

But it is otherwise where the offender used the copy knowing or having reason to believe that the entries in the original documents were forgeries and intending to use them for fraudulent purposes.

Queen v. Nujum Ali (1) and *Emperor v. Mular Singh* (2) distinguished.

APPEAL by Krishna Govinda Pal.

According to the prosecution story there was a dispute regarding the right to Mohanpore and five other mouzas in the district of Tippera between one Badarunessa and Girish Chandra Roy, grandfather of the appellant. A lease of these properties was granted by the former's father in 1862 to one Charan Chunder Shaha, the grandfather of Girish, which the latter alleged was a permanent or *kaimi* grant. Badarunessa claimed that the lease expired in 1911 and began

* Criminal Appeal No. 783 of 1915 against the order of T. W. Ward, Sessions Judge of Tippera dated July 22, 1915.

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to make direct settlements with the tenants. This led to a proceeding under section 107 of the Code of Criminal Procedure to bind both parties down to keep the peace. The appellant is said to have filed in that case a certified copy of that lease obtained from the Registration office, the register of which, Badarunessa complained, had been tampered with. Thereupon, Krishna Govinda Pal was placed on his trial and convicted by the Sessions Judge of Tippera under sections 466 and 471 of the Indian Penal Code and sentenced to 5 years' rigorous imprisonment. Being aggrieved thereby he preferred this appeal.

Mr. P. L. Roy (with him *Babu Manmatha Nath Mookerjee*, *Babu Bipin Chandra Bose*, and *Babu Upendra Kumar Roy*), for the appellant. The document is not a forgery but is said to be the copy of a forged document, viz., the registers alleged to have been tampered with. It was submitted (after going fully into the evidence), that the register of 1862, which was the subject of the present charge, was not forged and that no prosecution would lie for using a copy of a forged document.

[*HOLMWOOD J.* There is no forged document. How can your learned friend support this conviction?]

Nor is there any evidence of knowledge or user by the appellant.

[*HOLMWOOD J.* If this was a forgery, it must have been done 40 or 50 years ago.]

Mr. E. H. Monnier (with him *Maulvi A. K. Fazlul Huq* and *Babu Manindra Nath Banerjee*), for the Crown. The registers at sight clearly show that they had been forged. (Pointed out several instances of other forgeries in that register). I submit that there is a clear erasure below in which five forged deeds have been entered.

In *Queen v. Nujum Ali* (1) it has been held that if the original document is forged the use of a copy of it is using a forged document; and there is evidence of dishonesty in the present case.

[**HOLMWOOD J.** That case is distinguishable. There the accused actually used the copy for his own purpose and tried to get the Court to affirm its contents.]

[**MULLICK J.** Have you seen the ruling in *Emperor v. Mulai Singh* (2) where it has been held that the using of a copy of a forged document in favour of accused is an offence?]

For the purpose of setting up that document and not merely filing it on behalf of his master. If the party who puts it in is counsel or solicitor, he is equally guilty of using a forged document if he knows it to be forged.

The appellant was not called upon to reply

HOLMWOOD AND MULLICK JJ. This is an appeal from the judgment and sentence of the learned Sessions Judge of Tipperah who agreeing with the assessors found the appellant Krishna Govinda Pal guilty of an offence under section 471 read with 466 of the Indian Penal Code, and sentenced him to five years' rigorous imprisonment.

It appears that a document of the year 1862 was entered in the Register Book of the Registration Office at Comilla, Vol. I, Book 3, purporting to be a mokarari lease for 50 years in favour of the grandfather of the accused Girish Chandra Roy, who has been acquitted, coupled with an agreement to make the lease permanent on the expiry of 50 years, that is, from the year 1319. A copy of this document was

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obtained from the Registration Office and filed in a proceeding under section 107 of the Code of Criminal Procedure. We do not know what the meaning of filing the document in such a proceeding is, but the evidence which is very conflicting comes from persons who were called upon to show cause in the 107 proceedings on the other side and is to the effect that they saw the appellant put this bit of paper on the table in front of the peshkar. The Magistrate's record would show that the witness Ram Kanai who is now dead produced the document in the witness-box and proved it, and the Magistrate says, in a note in the middle of this evidence that the document was filed and exhibited; the accused himself, who was a witness, stated to the Magistrate that there was such a document in the possession of his master Girish Chandra Roy, and he shortly described its contents and he said it had been filed. But he did not say that he filed it himself, although there was no possible reason why he should not have said so, as at that time there was no question as to the genuineness of the document. He also says that he first came to know of the existence of this lease for 50 years eleven years ago. He does not set up any case that the original lease was a permanent *kaimi* lease, and he gives a perfectly true account of the document as it appears in the register in the Registration Office.

The learned Judge has come to the conclusion that the transcript in the Registration Office is itself a forged interpolation made after the year 1910, and in proof of this he adduces the evidence of a number of other Registration books in which there are what he calls obvious forgeries, and these apparently refer to documents relating to the same property. But we need hardly point out that a series of similar transactions which are not the offence charged can only be

used as evidence of the intention of the person who forged the document and not as evidence of forgery.

It cannot conceivably be used as evidence that the present accused in the year 1912 used the copy of a forged document knowing it to be forged. Who the people were who forged the other documents, if they were forged, and for what purpose they forged them is not necessarily known to the accused, and there is absolutely no evidence connecting the present accused with them. We have, therefore, altogether excluded this evidence.

The learned Judge then rightly sets himself to determine four questions: *first*, was the document, of which Ex. 38 is a certified copy, forged? *secondly*, did either of the accused know it to be forged? *thirdly*, did either of the accused use it as genuine? and, *fourthly*, did they do so fraudulently or dishonestly?

At the outset we find ourselves in entire disagreement with the learned Judge as to the *factum* of forgery. The learned Judge appears to have misdirected himself by reason of his not observing that the salient clause of the document is contained in its very first paragraph. He was under the impression that the document was throughout a temporary lease and that at the very end of it a clause had been interpolated transforming it into a permanent lease. He considers that this is not only inconsistent but must have been intentionally done with intent to commit fraud. He says, "the lease, if it is what the prosecution says it originally was, was a perfectly straightforward document that any intelligent person can understand, an ordinary temporary lease terminable with the year 1818. The lease as it exists now, however, appears to contain a contradiction in terms. To the average layman it is quite meaningless. It is only a trained

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lawyer who could say what its legal effect would actually be. No doubt important documents are occasionally drawn up in ambiguous language but fortunately that is very rare. Other things being equal therefore the internal evidence is enormously in favour of the prosecution." But he has omitted to notice that at the very beginning of the document, as we have said, it is stated that this is a temporary lease for 50 years up to the year 1318, and that from the year 1319 a permanent lease will be given, that is to say, it is a lease for a term with an agreement to give a permanent lease at the end of it. Whether that would be enforceable without a further document we are not concerned to say. But the intention of the parties is certainly perfectly clear and there is nothing meaningless about the document if it is read as a whole.

But the great difficulty about holding it to be a forgery is this that on the prosecution theory it cannot have been forged till after the year 1910, and any body looking at the book of the Registration Office, which we have before us, could not fail to be convinced that this transcript was engrossed many many years ago; that the ink as well as the paper on which it is written is just as old as the earlier part of the book which is admittedly genuine. It appears to us to be absurd to say that people sat down in 1912 to write on that paper over 50 years old, that they manufactured faded ink which also appears to be of equal age and succeeded in making a perfect transcript without any sign of ink running or sinking through the paper or any of the usual traces of modern forgery. Moreover, it is still more difficult to believe that they got the Sub-Registrar of 1862 out of his grave and made him sign his name in the book. There is not the faintest suspicion, so far as we can see, that the

Sub-Registrar's signatures on these numerous alleged forged documents are not absolutely genuine. They are certainly written by the same hand as made all the earlier entries. The writing is very characteristic. There is no attempt to make a copy of it. The signatures are not *fac similes*, but they are all of the same character as that of the admitted signature, and we can have no doubt that they are genuine.

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That being so, the whole case falls to the ground, though we may, in justice to the accused, say that we are equally able to hold that there is no evidence worthy of the name to show that he made use of this document or that he had any dishonest intention, or that he had any idea that the original was a forgery. It is also extremely doubtful whether the mere filing of a copy is user of a forged document. The copy itself is certainly not a forged document and the conditions in which it has been held that the user of a copy amounts to an offence in the cases of *Queen v. Nujum Ali* (1) and *Emperor v. Mulai Singh* (2) are clearly distinguishable from this case, inasmuch as they were cases where the offender used the copy knowing or having reason to believe that the entries in the original documents were forgeries, and intending to use them for fraudulent purposes. One very point that is necessary to establish the charge, we are able to find in the appellant's favour.

We, accordingly, set aside the conviction and sentence and direct the acquittal and release of the accused.

G. S.

Accused acquitted.

(1) (1866) 6 W. R. Cr. 41.

(2) (1906) I. L. R. 28 All. 402.

APPELLATE CIVIL.

Before Mookerjee and N. R. Chatterjee JJ

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Nov. 24.

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v.

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AND

CHITTAGONG DISTRICT BOARD.*

Sale—Immoveable property—Transfer of Property Act (IV of 1882), s. 4—District Board, sale by—Incorporated Company—Suit, dismissal of—Contract, rescission of—Waiver—Respondent—Cross-objection—Civil Procedure Code (Act V of 1908) O. XLI, rr. 22 (3), 33—Corporation, duty of, when it receives money under an illegal or ultra vires agreement.

Section 54 of the Transfer of Property Act provides that a sale of tangible immoveable property of the value of Rupees 100 and upwards can be made only by a registered instrument. Title to land, therefore, cannot pass by a mere admission when the statute requires a deed.

Jadu Nath v. Rup Lal (1), *Dharam Chand v. Manji Sahu* (2), *Narak Lall v. Mangoo Lall* (3) referred to

Hemendra Nath Mukerjee v. Kumar Nath Roy (4) distinguished.

The effect of Rules 93 and 98 of the Statutory Rules, made by the Lieutenant-Governor on the 15th December 1885 under s. 138(d) of Beng. Act III of 1885, is that no immoveable property vested in a District Board can be sold, except with the previous approval of the Local Government and except by an instrument under the common seal signed by the Chairman and by two members of the Board.

It is a well settled principle of interpretation that Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to

* Appeals from Appellate Decrees, Nos. 1243, 1979 to 1981 of 1912 against the decrees of J. Phillimore, District Judge of Chittagong, dated Feb. 9, 1912, modifying the decrees of Asutosh Banerjee, Subordinate Judge of Chittagong, dated Nov. 28, 1910.

(1) (1906) I. L. R. 33 Calc. 967. (3) (1911) 22 C. L. J. 320.

(2) (1912) 16 C. L. J. 436. (4) (1904) I. L. R. 32 Calc. 169.

construe, execute and apply it, although such interpretation has not by any means a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons.

Baleswar v. Bhagirathi (1) referred to.

When a public body or a Company is established by statute or is incorporated for special purposes only and is altogether the creature of Statute Law the pre-creptions for its acts and contracts are imperative and essential to their validity

Ward v. Beck (2), *Stapleton v. Haymen* (3), *The Andalusian* (4), *Le Feuvre v. Miller* (5), *Cope v. Thames Haven* (6), *Diggle v. London and Blackwell Ry.* (7), *Frent v. Dennett* (8), *Cornwall Mining Co. v. Bennett* (9), *Irish Pest Co. v. Phillips* (10), *Bottomley's Case* (11) and *In Re Gifford and Bury Town Council* (12) referred to.

A suit need not be dismissed merely because the authority for its institutions such as a certificate under the Pensions Act, 1861 or section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act or section 4 of the Succession Certificate Act is not produced with the plaint. But this principle has no application to a case where the plaintiff at the date of the institution of the suit had no title at all.

Sarat Chandra v. Apurba Krishna (13) referred to

One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former; but, if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first and the two must be construed together, where the new contract is consistent with the continuance of the former one, it has no effect unless and until it is performed

Hunt v. South Eastern Ry. Company (14), *Dodd v. Charlton* (15), *Patmore v. Colburn* (16), *Thornhill v. Yeats* (17) referred to.

But where parties enter into a contract which, if valid, would have the effect, by implication, of rescinding a former contract and it turns out that the second transaction cannot operate as the parties intended, it does not

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| (1) (1903) I. L. R. 35 Calc. 701 | (9) (1860) 5 H. & N. 423 |
| (2) (1863) 13 C. B. (N. S.) 668 | (10) (1861) 1 B. & S. 598. |
| (3) (1864) 2 H. & C. 918. | (11) (1850) 16 Ch. D. 681 |
| (4) (1878) 1 L. R. 3 P. D. 182 | (12) (1888) 2 Q. B. D. 358 |
| (5) (1857) 8 E. & B. 321 | (13) (1911) 14 C. L. J. 55. |
| (6) (1849) 3 Exch. 841. | (14) (1875) 45 L. J. C. P. 67. |
| (7) (1850) 5 Exch. 442 | (15) [1897] 1 Q. B. 562. |
| (8) (1850) 4 C. B. (N. S.) 576. | (16) (1831) 1 Cr. M. & R. 65 |
| | (17) (1860) 8 C. B. (N. S.) 531. |

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have the effect, by implication, of affecting their rights in respect to the former transaction.

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Noble v. Ward (1), *Doe dem. Biddulph v. Poole* (2) referred to.

Where the question is, whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.

Mersey Steel and Iron Company v. Naylor Benson & Co. (3), *General Bill-posting Co. v. Atkinson* (4) referred to.

The Court requires as clear evidence of the waiver as of the existence of the contract itself, and will not act upon less.

Carolan v. Brabazon (5) referred to.

Where a corporation receives money or property under an agreement, which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others, without authority, the law, independently of express contract, will compel restitution or compensation.

Chapleo v. Brunswick Building Society (6) referred to.

As an ordinary rule a respondent in an appeal is not entitled to urge cross-objections except as against the appellant. But rule 22(3) of Order XLI of the Code of 1908 has materially altered the pre-existing law by the substitution of the words "party who may be affected by such objection" for the word "appellant" contained in section 561(3) of the Code of 1882. Further, rule 33 of Order XLI has conferred wide discretionary powers on the Court of Appeal to alter the decree of the Court below as the case may require.

SECOND APPEAL by Mathura Mohan Saba and others, the defendants.

This appeal arises out of five analogous title suits. The facts, briefly stated, are these. The plaintiff's case in suit No. 435 (the facts of this case will give us an idea of the facts in the other suits as well) is "that the land described in the schedule belongs to the plaintiff".

(1) (1866) 4 H. & C. 149; (3) (1884) 9 App. C. 44 434.

L. R. 1 Exch. 177. (4) [1909] A. C. 118, 122

(2) (1848) 11 Q. B. 713. (5) (1846) 3 J. & L. 200

(6) (1881) 6 Q. B. D. 696.

in *kaemi-dar-tapa* right. Out of the said land 10 gandas *shahi* is in his *khas* possession and 10 gandas *shahi* is in the occupation of the tenant defendant No. 1 under the plaintiff. The plaintiff has his godown on the said *khas* plot of land; that the defendant No. 1 and the members of his family out of malice and *zid* proposed to the District Board to acquire the same for a tank and made a gift of Rs. 1,016 in December 1895 and the District Board duly asked the Land Acquisition Department to acquire the same, but the possession of the plaintiff was not interfered with and the plaintiff remained in possession for more than 12 years acquiring further right by adverse possession; that although the land was acquired the plaintiff did not withdraw the compensation money. The plaintiff all along objected to the same and on the representation of the said facts Mr. Skrine, the then Commissioner, made the following remarks:—"The Government after all, by its letter No. 2903, dated 21st May 1898, ordered the relinquishment of the same and the then Collector, Mr. Anderson, ordered to give up the land to the respective owners." Then, by a letter No. 775, dated 31st August 1898, the plaintiff was directed to deposit Rs. 25 costs incurred in acquisition and to refund land acquisition money (not withdrawn) with a view to return the land to him. The plaintiff, accordingly, by *challan*, No. 2, dated 6th September 1898, deposited the same amount. Again another notice was issued upon the plaintiff on 16th of December 1898 to refund land acquisition compensation money (Rs. 530-5 annas), but the plaintiff, on the 11th January 1898, filed an objection intimating that no money was withdrawn. That after a great deal of correspondence, the then Chairman, Mr. Lea, asked the plaintiff to give a donation of Rs. 1,000 to the dispensary, to deposit Rs. 957-11-1 pie the total of the

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land acquisition compensation and a stamp of the value of Rs. 10 for a conveyance. The plaintiff complied with this request. The Secretary to the Dispensary Committee received the said sum of Rs 1,000 and the plaintiff deposited the money and the stamp. The conveyance was drawn up but not executed although the plaintiff was given to understand that it would be executed. The plaintiff then came to know that without completing the conveyance as arranged and without notice to the plaintiff, the defendant No. 2, without properly notifying, caused the land to be sold in collusion with the defendant No. 1 who, in spite of the plaintiff's objection to the sale, caused the sale of the land of the schedule on 22nd February 1909 for Rs. 1,200. The plaintiff has had his godown on the land and has had possession of the same for more than 12 years. The plaintiff submitted that the sale was a direct refusal to convey. He also submitted that the District Board had no saleable interest in the land and it had no right to cause the sale of the land and contended that the sale was ineffective. That, inasmuch as the defendant No. 1 threatened the plaintiff with the demolition of his godown on enforcement of his purchase by suit—the plaintiff was compelled to bring this suit to prevent the damage. That the plaintiff moved the authorities first not to put the *mihal* to sale and then to annul the sale but to no purpose. The plaintiff, therefore, prayed among other things: (a) that the plaintiff, *kaemi-dar-tapa* and rights by adverse possession be declared and established; (b) that the defendant be directed not to give and take delivery of possession; (c) or that the land be returned to the plaintiff as agreed upon and conveyance executed within a time fixed by the Court and in default for the Court to execute the conveyance in his favour and that the plaintiff's possession be

confirmed; (d) and also in the alternative the defendant be made liable for compensation to the extent of Rs. 1,957-11-1 pie and interest as compensation thereon at 1 per cent. per annum from the date of payment and same interest up to the date of valuation.

The defendant No. 1 Ram Sundar, before his death, filed a written statement denying most of the allegations of the plaintiff. The written statement stated that, at the request of Babu Kailash Chandra Das, Vice-Chairman of the District Board, Babu Ram Kamal Saha made over Rs. 1,016 to the District Board to excavate a good drinking-water-tank at Paragalpur village to remove the want of the villagers for good drinking water and the Board accepted the money. Accordingly the District Board moved Government to acquire the land in suit and other lands were acquired and the District Board was put into possession with the result that the interests which the previous owners had in these lands came naturally to an end. The plaintiff, after the acquisition and possession of the land by the District Board, entered upon the land in suit as a mere trespasser. For reasons unknown to this defendant the District Board gave up the idea of excavating the tank and under instructions from Government (the previous owners of the several plots were asked to take back their respective plots on payment of the cost price but they did not) the lands were sold by public auction on the revenue sale day (22nd February 1909) after due service of notice for sale and this defendant purchased the land at Rs. 1,290—the highest price offered at sale—and was duly put into possession on the 31st of July 1909. This defendant duly obtained a sale certificate and a Deed of Release by the Board. As the plaintiff opposed this defendant to hold possession of the land the defendant has brought a

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title suit against the plaintiff in the Munsiff's Court. The written statement further stated that the plaintiff's suit was bad for misjoinder of causes of action and parties and also was barred by limitation. The defendant No. 2, the District Board, supported the main allegations of the defendant No. 1 and contended that it had no concern with the donation made by the plaintiff to the Dispensary Committee and it was ready to refund the money deposited by the plaintiff for the conveyance and finally that it was not liable for damages, interests and costs.

The four other suits were brought by the deceased Ram Sundar Saha and his co-sharers to recover possession of the land—already subject-matter of litigation—and some other plots acquired by Government for the District Board and sold by auction to the plaintiff Ram Sunder.

The Court of first instance decreed suit No. 435 with modification. Ram Kumar Saha was ordered to get back Rs. 992-11-1 from the District Board, defendant No. 2 with interest at 6 per cent. The other four suits were decreed with costs. The plaintiff's title to the lands in suit were declared and he was given a decree for possession with *mesne profits* and costs against Ram Kumar Saha.

Four appeals were then preferred to the District Judge by Ram Kumar Saha; namely, one appeal by him in his suit and three appeals by him in three of the four other suits: the lands comprised in these three suits were identical with what was comprised in his suit. Consequently the subject-matter of the controversy before the District Judge was restricted to that portion of the land which originally belonged to Ram Kumar Saha. The District Judge in the suit of Ram Kumar Saha modified the decree of the Primary Court. He confirmed the decree in his favour

for Rs. 992-11-1, but he made the recovery of this sum from the District Board conditional on his making over possession of the land to the Board within six months. In the other three suits brought by Ram Sundar Saha he allowed the appeals by Ram Kumar Saha and dismissed the claim for possession on the ground that the sale of the 22nd of February was inoperative in law. The representatives of Ram Sundar Saha, who had died in the interval, have preferred four appeals to this Court and have contended that the sale mentioned was valid and operative. Ram Kumar Saha has preferred a memorandum of cross-objections in the appeal which arises out of his suit and has argued that he had a good title to the land and was entitled at any rate to a decree for specific performance against the Board.

Sir Rashbehary Ghose and *Babu Dhirendra Lal Kastgir*, for the appellants.

Babu Mahendra Nath Roy and *Babu Gunada Charan Sen*, for the respondents.

Babu Kshitish Chandra Sen, for the District Board.

Cur. adv. vult.

MOOKERJEE AND CHATTERJEE JJ. The history of the litigations, which have culminated in these appeals, consists principally of matters of record, and has not formed the subject of controversy in the elaborate arguments addressed to this Court. In 1895 one Ram Kamal Saha made over a sum of money to the District Board of Chittagong for the acquisition of a tract of land, in order that a tank might be excavated thereon for the benefit of the inhabitants of the locality. On the 15th June 1897, the usual declaration was published under the Land Acquisition Act;

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the land was, in due course, delivered to and became vested in the District Board on the 11th and 21st February 1898. It subsequently transpired that Ram Kamal Saha, the donor, was not moved by motives of public philanthropy, but that his real object as also the object of Ram Sundar Saha, now represented by the appellants, his three sons, was to spite his relation Ramkumar Saha (the respondent in these appeals) who was owner of a substantial portion of the property acquired. As Mr. Skrine, the then Commissioner of the Chittagong Division, observed, the country was honeycombed with tanks, and it was simply monstrous to wish to pull down godowns and buildings to excavate another tank. The result was that, on the 7th March 1898, the District Board decided to abandon the project; but as possession of the land acquired had already been taken, the Government was not at liberty to withdraw from the acquisition under section 48 (1) of Act I of 1894. The Bengal Government accordingly informed the Commissioner, on the 21st May 1898, that the Government could not withdraw from the acquisition of the land at that stage, and forwarded the opinion of the Superintendent and Remembrancer of Legal Affairs, that if the Board did not want the land, they could arrange with the original owners or others to take the land off their hands at the price paid for its acquisition. On the 29th August 1898, the Board intimated to Ramkumar Saha that as they had abandoned the project, it had become necessary to return the land to its original owner, and they enquired of him, whether he was willing to take back the land on payment of Rs. 25 as the expenses of acquisition. The owner, who was obviously anxious to get back the land, which he had lost by reason of what was essentially an unwarrantable misuse of the machinery

provided in the Land Acquisition Act, deposited the amount in the Treasury on the 6th September 1898. The Land Acquisition Collector, apparently in ignorance of these proceedings, called upon Ramkumar Saha on the 16th December 1898, to receive Rs. 538-5-6 as compensation for that portion of his land which had been acquired for the benefit of the District Board. On the 10th January 1899, Ramkumar Saha wrote to the Land Acquisition Collector and refused to take the compensation money on the ground that he had already accepted and acted upon the offer of the Board to retransfer the land to him on payment of Rs. 25. The sum held in deposit by the Land Acquisition Collector as compensation was subsequently made over by him to the District Board. The District Board, however, did not execute a conveyance in favour of Ramkumar Saha, and, so far as we can gather, the latter also did not press for a regular deed. The reason, no doubt, was that notwithstanding the proceedings for acquisition he continued in actual occupation of the land. More than two years later, on the 27th November 1900, the Land Acquisition Collector intimated to Ramkumar Saha that Rs. 957-11-1 had been spent for acquisition of the land, that Rs. 538-5-6 which at one time stood to his credit as owner of the land acquired, had been made over to the District Board, and that the land would be given to him on payment of the balance, Rs. 491-5-7. This offer, so far as can be made out from the record, covered not only the land of Ramkumar Saha which had been acquired for the District Board, but also other lands in the neighbourhood which had been acquired for the purposes of the same project of excavation of a tank. On the 4th December 1900, Ramkumar Saha deposited in the Treasury the entire sum of Rs. 957-11-1; and on or

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about the same date, a draft conveyance in his favour was drawn up on a stamped paper purchased at his cost for Rs. 10. The conveyance, however, for some unexplained reason, was neither executed nor registered. About a year later, on the 2nd August 1901, the Bengal Government intimated to the Commissioner of the Chittagong Division that the land should be offered to the original owners at cost price, and that if they declined, it should be sold by public auction. The letter added that in either case, the net sale-proceeds should be given to the donor or his personal representatives who had paid the cost of acquisition. On the 24th February 1902, the District Board issued a letter to Ramkumar Saha and informed him that if he did not, within thirty days, deposit Rs. 538-5-6 as price of the land and Rs. 13-9-6 as cost of acquisition (total Rs. 551-15-0) to take back his land, the land would be sold by public auction. Obviously the District Board authorities overlooked that a much larger sum than what was demanded had already been deposited by Ramkumar Saha. The record does not show what reply was submitted by the latter. We know, however, that on the 20th October 1902 the Land Acquisition Collector intimated to Ramkumar Saha and several other persons (some of them apparently his superior landlords, and others his tenants) that they should on payment of Rs. 872-2-3 within 6th November 1902, take back the land, and, that otherwise, it would be sold by public auction. The notice explained, on the face of it, that the sum demanded was obtained by deduction of Rs. 118-9-9, that is, 15 per cent. from Rs. 990-12-0 (which was the cost of acquisition of the land in four parcels under four declarations; the respective amounts were Rs. 50-8-3, 36-11-0, 62-8-10 and 841-10-0). The record does not show what followed upon this notice, but, it is plain, that the Land

Acquisition Collector overlooked that a much larger sum than what he demanded had been deposited nearly two years before. The position now was that Ramkumar Saha did not get a title deed for the whole land, although he had fully complied with the requisition of the District Board and of the Land Acquisition authorities. Meanwhile, on the 17th May 1903, the Commissioner of Chittagong had asked permission of the Board of Revenue to restore the acquired land to the original owners. Why this was done is not explained because we know that on two previous occasions, namely, on the 21st May 1898 and on the 2nd August 1901, the Local Government had, expressly or impliedly, approved the proposal for retransfer of the land to the original owners; it is useless to speculate whether the letter of the 17th May 1903, was written, because the previous correspondence and the orders contained therein were overlooked. The record shows that on the 29th May 1903, the Board of Revenue held that their sanction was not necessary, and that as the land had vested in the District Board, the latter were competent to effect the proposed retransfer to the original owner. What action was taken by the District Board on receipt of this reply does not transpire from the evidence on the record; but we find that on the 24th March 1904, Ramkumar Saha petitioned to the District Board for return of Rs. 992-11-1, which had been in deposit then for several years (the sum was made up of Rs. 25 paid on the 6th September 1898, Rs. 10 paid on account of stamp on the 3rd December 1900, and Rs. 957-11-1 deposited on the 4th December 1900). No notice was taken of this application by the District Board authorities. Ramkumar Saha waited for three years and renewed his application on the 9th June 1907, but with no better result. He again renewed his application on the 12th August 1907.

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Upon this application, the Chairman of the District Board, on the 26th December 1907, directed that the sum might be refunded, because in his opinion, the land should be retained and the tank constructed; he added in his note that the acceptance of the refund by Ramkumar Saha would estop the latter in any claim on the unexecuted conveyance and he specifically directed that the applicant might be asked to take the money. This instruction, however, was not carried out; the order of the Chairman was not notified to Ramkumar Saha, nor was the money ever paid or tendered to him, though an attempt is made in the oral evidence to show that a clerk of the District Board office verbally communicated the substance of the order of the Chairman to an officer of Ramkumar Saha. The fact remains, that the money is even now in the hands of the District Board authorities. On the 22nd February 1909, the District Board put up the land to auction. Ramkumar Saha, who was in occupation all this time, as soon as apprised of the intentions of the Board, appeared and objected to the sale on the ground that the Board had already contracted to sell the property to him. The objection was summarily overruled, and the property was sold to Ram Sundar Saha as the highest bidder for Rs. 1,280. On the 14th May 1909, what is called a sale certificate was issued to the purchaser; as the property was not specifically described in this document, the Chairman of the District Board executed in favour of the purchaser a deed of release on the 12th July 1909. Symbolical possession of the property is said to have been delivered to the purchaser on the 17th August 1909; but he was not able to obtain actual possession. The result was that on the 28th September 1909 the purchaser instituted four suits in the Court of the Munsif of Chittagong for declaration of title by purchase and

for recovery of possession from Ramkumar Saha ; the District Board of Chittagong was not joined as a party defendant to these suits. The purchaser instituted four different suits, apparently on the ground that the land had been acquired in four distinct parcels on the basis of four declarations under the Land Acquisition Act. On the 16th December 1909, Ramkumar Saha instituted a cross-suit in the Court of the Subordinate Judge of Chittagong, against Ram Sundar Saha, the purchaser, and the Chairman of the District Board. This suit relates only to that portion of the land which had originally belonged to Ramkumar Saha. The plaint formulates the relief claimed as follows :—*first*, that the title of the plaintiff in *kaemi-dar-tapa* right and right by adverse possession be declared ; *secondly*, that the purchaser defendant be restrained in his attempt to take possession ; *thirdly*, that the District Board be made to execute a conveyance in his favour and that his possession be confirmed ; *fourthly*, that he be awarded a decree for damages for Rs. 1,957-11-1 with interest and costs ; *fifthly*, that he be granted such relief as the Court might think fit. Subsequently to the institution of this suit, the suits in the Court of the Munsif were transferred to the Court of the Subordinate Judge and the five suits were tried together. The Subordinate Judge, in the suit of Ramkumar Saha, allowed him a decree for Rs. 992-11-1 against the District Board, with interest thereon from date of judgment until payment. In the suits by Ram Sundar Saha, the Subordinate Judge gave him a decree for possession with *mesne profits* and costs against Ramkumar Saha. Four appeals were then preferred to the District Judge by Ramkumar Saha, namely, one appeal by him in his suit, and three appeals by him in three of the four other suits ; the lands comprised in these three suits were identical with what

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was comprised in his suit. Consequently the subject-matter of the controversy before the District Judge was restricted to that portion of the land, which originally belonged to Ramkumar Saha. The District Judge in the suit of Ramkumar Saha modified, to his detriment, the decree of the primary Court. He confirmed the decree in his favour for Rs. 992-11-1, but he made the recovery of the sum from the District Board conditional on his making over possession of the land to the Board within six months. In the other three suits, brought by Ram Sundar Saha, he allowed the appeals of Ramkumar Saha and dismissed the claim for possession on the ground that the sale of the 22nd February 1909 was inoperative in law. The representatives of Ram Sundar Saha, who had died in the interval, have preferred four appeals to this Court and have contended that the sale mentioned was valid and operative. Ramkumar Saha has preferred a memorandum of cross-objections in the appeal which arises out of his suit and has argued that he had a good title to the land and was at any rate entitled to a decree for specific performance against the District Board. Notice of the memorandum of cross-objections was, however, served at first only on the appellants, and when this was brought to the notice of the Court, the hearing of the appeals was adjourned, at the request of the Counsel for the District Board, to enable him to consider the position and to receive adequate instructions: it was ultimately intimated to the Court that the District Board supported the contention of the appellants and opposed the cross-objections of their co-respondent, Ramkumar Saha. The appeals have been elaborately argued on both sides, and the points which emerge for consideration as also the facts whereon they are based may be briefly summarised.

The land now in dispute admittedly belonged originally to Ramkumar Saha. At the instance of Ramkamal Saha and Ramsundar Saha, the land was acquired under the Land Acquisition Act and was vested in the Chittagong District Board for the excavation of a tank. The project was subsequently abandoned, and the District Board, with the concurrence of the Local Government, decided to return the land to the original owner on payment of the actual expenses of the acquisition, as no compensation had been previously paid to him. The District Board, through their Vice-Chairman, then made an offer to Ramkumar Saha to return the land to him, if he paid Rs. 25, as the expenses of acquisition. This offer was forthwith accepted, and the money was deposited in the Treasury. Though no formal conveyance was executed, Ramkumar Saha continued in occupation, presumably on the strength of this agreement. Two years later, a second offer was made to Ramkumar Saha by the Land Acquisition Collector, on behalf of the District Board, to transfer to him the whole of the land acquired (inclusive of the land covered by the previous agreement) if he would pay Rs. 957-11-1 which had been assessed as compensation. This offer was also accepted, and the amount demanded was forthwith deposited. A draft conveyance was prepared, but was not executed for some unexplained reason. More than a year later, the District Board, through their Chairman, offered to Ramkumar Saha to retransfer to him his portion of the land on payment of Rs. 538-5-6, the amount assessed as compensation therefor, and Rs. 13-9-6, the proportionate amount of expenses of acquisition. A few months later, the Land Acquisition Collector on behalf of the District Board, offered to retransfer the land to Ramkumar Saha, his landlords and his tenants, if

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Rs. 990-12-0 was paid. What took place on these offers, does not transpire from the record; but two years later, Ramkumar Saha petitioned for refund of his deposit; this was of no avail, and a renewed application three years later was equally fruitless. On a third application by him, some months later, the Chairman of the District Board directed a refund, but his order was neither communicated nor carried out. More than a year afterwards, notwithstanding protest by Ramkumar Saha, the District Board put up the land to auction, when it was purchased by Ram Sundar Saha, who had, 11 years earlier, set the machinery of the Land Acquisition Act in motion to deprive his rival of the land in suit. The purchaser, however, was not able to obtain actual possession and was obliged to sue for recovery of possession, with the result that a cross-suit was instituted by Ramkumar Saha with a view to perfect his own title or to recover damages from the District Board. The outstanding features of the case, then, are, that Ramkumar Saha has never been paid any compensation for his land, and has, on the other hand, paid to the District Board authorities, with a view to obtain a retransfer thereof, a sum of Rs. 992-11-1 of which the Board had enjoyed the benefit for 9 years at the date of the institution of the suit. The only question is, what are the legal rights of the parties; for, there is not much room for doubt as to where the justice of the case lies. It is convenient to examine, at the outset, the position of Ram Sundar Saha who was the first to come into Court and to launch these litigations.

There is no controversy that under section 16 of Act I of 1894, the title vested absolutely in the District Board when possession of the land acquired was taken by the Collector on the 11th and 21st

February 1898. The question arises, whether that title has been subsequently transferred to Ram Sundar Saha. The District Judge has held that the answer must be in the negative. The purchaser relied upon the sale certificate granted to him on the 14th May 1909, and the release executed in his favour on the 12th July 1909; the Court of Appeal below has held that neither is of any avail. Section 54 of the Transfer of Property Act provides that a sale of tangible immoveable property of the value of Rs. 100 and upwards can be made, only by a registered instrument. The sale certificate was not registered and cannot consequently operate as a valid conveyance. The release was registered, but it does not purport to be a conveyance, and was stamped, not as a conveyance but as a release; as stated on the face of it, it was granted, because the property covered by the sale-certificate was not described with sufficient precision in that document. A release of this character cannot operate to transfer title, because, as has been repeatedly ruled in this Court, title to land cannot pass by a mere admission when the statute requires a deed: *Jadu Nath v. Rup Lal* (1) *Dharam Chand v. Manji Sahu* (2) and *Narak Lall v. Mangoo Lall* (3). The decision in *Hemendra Nath v. Kumar Nath* (4) [which at an earlier stage is reported in *Hemendra Nath v. Kumar Nath* (5)] is distinguishable; there this Court held upon a construction of all the terms of the particular instrument that though called a deed of disclaimer it operated as a deed of transfer; the Court did not formulate any general proposition of universal application that a deed of release has always

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| (1) (1936) I. L. R. 33 Cale. 967 | (3) (1911) 22 C. L. J. 350. |
| 10 C. W. N. 650; | (4) (1909) 12 C. W. N. 478. |
| 4 C. L. J. 22 | (5) (1904) I. L. R. 32 Cale. 169; |
| (2) (1912) 16 C. L. J. 436. | 2 C. W. N. 96 |

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the same operation as a conveyance. But even if the release in this case could, by any stretch of language, be construed as a conveyance, there would be a fatal objection to its validity. Neither the release nor the sale certificate fulfils the requirements of Rule 98 of the Statutory Rules made by the Lieutenant-Governor on the 15th December 1885 under section 138 (*d*) of Beng. Act III of 1885 (Bengal Local Self-Government Act). Rule 98 is in these terms: "every transfer of immoveable property, vested in a Board, shall be made by an instrument under the Common Seal, signed by the Chairman and by two members of the Board, and, where these rules require the previous approval of the Commissioner of the Division, the fact that the transfer is signed with such approval shall be distinctly expressed." This rule must be read along with Rule 93, which, so far as relevant to the present matter, provides that "no immoveable property vested in a District Board shall, except with the previous approval of the Local Government and in such manner and on such terms and conditions as that Government may approve, be transferred by the Board by way of sale." The effect of these two rules, consequently, is that no immoveable property vested in a District Board can be sold, except with the previous approval of the Local Government and except by an instrument under the Common Seal signed by the Chairman and by two members of the Board. Neither the sale certificate nor the release fulfils this condition, as both the documents, though sealed and signed by the Chairman, were not signed by two members of the Board. The Appellants have sought to escape from this difficulty by a two-fold argument, namely, *first*, that Rules 93 and 98 are *ultra vires*; and, *secondly*, that Rule 98, if *intra vires*, is directory and not mandatory.

In support of the first contention, reference has been made to sections 20 and 138 (*d*) of Beng. Act III of 1885. The former section defines a District Board as a Body Corporate with power to acquire and hold property both moveable and immoveable, and, subject to any rules made by the Lieutenant-Governor under the Act, to transfer any such property held by it and to contract and do all other things necessary for the purposes of the Act. A District Board has, consequently, power to transfer property held by it, subject to any rules made by the Lieutenant-Governor under the Act. Section 138 (*d*) authorises the Lieutenant-Governor to make rules consistent with the Act for the purpose of regulating the powers of District Boards to transfer property. The appellants have argued that this authorises the Lieutenant-Governor to frame rules which impose restrictions on alienations, but not to frame rules which prescribe the formalities to be observed when alienations are made. After careful consideration of the argument addressed to us, we are unable to accept this contention. The expression "regulate the powers," when applied to a rule, appears to us to be comprehensive enough to include, not only rules which restrict the power of alienation to property of specified value and kind, but also rules which regulate the mode in which the alienation is to be effected. It is conceivable, for instance, that the rules may prescribe that a District Board may sell land for one purpose and not for another, or that the sale can be made only with the assent of the Local Government when the value of the land exceeds a prescribed limit, or that the conveyance is, in certain cases, to be executed by the Chairman alone, while, in other cases, it is to be signed by the Chairman and a member of the Board. Rules framed in this behalf may, without undue stretch

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of language, be deemed to be rules regulating the powers of the District Board. The term "regulate" is defined as follows in the Oxford Dictionary, Vol. VIII, p. 379 : "to control, govern or direct by rule or regulations, to subject to guidance or restrictions, to adapt to circumstances or surroundings." Consequently, a rule to regulate a power may be a rule to restrict the exercise of the power as also a rule to guide the exercise of the power; though, as Lord Davey said in *Municipal Corporation of Toronto v. Virgo* (1), authority to regulate does not include a power to prevent or prohibit, because, in the language of Lord Watson in *Attorney-General v. Attorney-General* (2), a power to regulate assumes the conservation of the thing which is to be made the subject of regulation. Subject to this qualification, a rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power. In our opinion, Rules 93 and 98 are not *ultra vires*. In the interpretation of the scope of section 138 (d), some stress may also be laid upon the circumstance that immediately after the enactment of the section by the Legislature, the construction now accepted by us was placed thereon by the authority charged with the duty of framing the rules. As was explained in *Baleshwor v. Bhagirathi* (3), it is a well-settled principle of interpretation that Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation has not by any means a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons. We may add that if the contention of the

(1) [1896] A. C. 88

(2) [1896] A. C. 348

(3) (1908) I L. R. 35 Calc. 701, 713;

12 C. W. N. 657; 7 C. L. J. 563.

appellants were to prevail, the object of the Legislature would obviously be defeated; instead of a simple and definite rule as to the mode in which transfers are to be effected, we would have here all the uncertainty which prevails in other systems of law as to the manner in which transfers may be validly effected by a Corporate Body.

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In support of the second contention, namely, that Rule 98, if not *ultra vires*, is merely directory and not mandatory, it has been argued that the rule does not, by the use of negative words, expressly provide that a valid transfer can be effected in no other way, and reference has in this connection been made to the decisions in *Liverpool-Borough Bank v. Turner* (1) and *Cole v. Green* (2). In the first of these cases, it was ruled that although the Merchant Shipping Act, 1851, contains no provision negativing the validity of a mortgage made otherwise than according to the terms of the Act, the whole scope of the Act is to that effect, and an equitable mortgage is consequently invalid. In the second case, it was ruled that a contract within the scope of section 151 of Stat. 3 and 4 Will. IV, Ch. 68 is not void, though not signed "by the Commissioner or by any three of them, or by their clerk" as prescribed by that section. In our opinion, the contention of the appellants is not well founded. Rule 98 must be read along with Rule 93, and the latter rule does use appropriate words to indicate that no immoveable property vested in a District Board can be transferred by way of sale, except in such manner as the Local Government may approve. The intention is clearly manifest that a transfer shall not be made except in the manner prescribed by Rule 98. The whole aim and object of the law would plainly be

(1) (1860) 1 John & H. 159; (2) (1843) 6 M. & G. 872, 890.

2 DeG. F. & J. 502, 507.

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defeated, if here, the command to do the thing in a particular manner did not imply a prohibition to do it in any other; indeed the language used in Rule 93 leaves no room for doubt as to the intention : *Jolly v. Handcock* (1), *Re Dickinson* (2). The decisions relied upon by the appellants are clearly of no avail. The observations of Lord Campbell, L. C., in *Liverpool Borough Bank v. Turnier* (3), show that a transfer in a mode other than that prescribed may be null and void, even though there are no negative words in the statute declaring that all transfers in any other form shall be null and void. No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience ; it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed : *Howard v. Bodington* (4). The decision in *Cole v. Green* (5) seems, at first sight, to assist the contention of the appellants, but on closer examination, turns out to be clearly distinguishable, as there the clause in question, according to strict grammatical construction, was held not to form part of the proviso ; the judgment of Tindal, C. J., shows that if the latter part of the section could be treated as part of the proviso, it would have been deemed imperative and not directory only. Here, however, Rule 98, when read with Rule 93, shows that the requirement as to signature by two members of the Board is mandatory and not directory. This is shown also by an application of a useful test, namely, do the statutory prescriptions affect the performance of a duty or do they

(1) (1852) 7 Exch. 820.

(4) (1877) 2, P. D. 203.

(2) (1882) 20 Ch. D. 315.

(5) (1843) 6 M. & G. 872, 891.

(3) (1860) 1 John & H. 159;

2 I&G. F. & J. 502, 507.

relate to a privilege or power. It is well settled that where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it is neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred: *Caldow v. Pinell* (1). On the other hand, where a public duty is imposed and the statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. The distinction between the two classes of cases is illustrated by the decisions in *Ward v. Beck* (2), *Stapleton v. Haymen* (3), *The Andalusian* (4), *LeFeuvre v. Miller* (5), *Cope v. Thames Haven Ry. Co.* (6), *Diggle v. London and Blackwall Ry. Co.* (7), *Frend v. Dennett* (8), *Cornwall Mining Co. v. Bennett* (9), *Irish Peat Co. v. Phillips* (10), *Bottomley's Case* (11), and *Re Gifford and Bury* (12). These cases show that when a public body or a company is established by statute or incorporated for special purposes only, and is altogether the creature of Statute Law, the prescriptions for its acts and contracts are imperative and essential to their validity.

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| (1) (1877) 2 C. P. D. 562 | (7) (1850) 5 Exch 442. |
| (2) (1863) 13 C. B. (N. S.) 668; | (8) (1858) 4 C. B. (N. S.) 576; |
| 134 R. R. 691. | 114 R. R. 859. |
| (3) (1864) 2 H. & C. 918; | (9) (1860) 5 H. & N. 423; |
| 133 R. R. 858. | 120 R. R. 670. |
| (4) (1878) 3 P. D. 182. | (10) (1861) 1 B. & S. 598; |
| (5) (1857) 8 E. & B. 321; | 124 R. R. 680. |
| 112 R. R. 582, | (11) (1880) 16 Ch. D. 681. |
| (6) (1849) 3 Exch. 841; | (12) (1888) 20 Q. B. D. 268. |
| 77 R. R. 859. | |

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The case of *Frend v. Dennett* (1) is specially instructive. The Public Health Act, 1848, enacted that contracts exceeding £10 in value should be sealed with the seal of the Board; that they should contain certain particulars; and that every contract so entered into shall be binding; provided always that before contracting for the execution of any work, the Board shall obtain from the Surveyor a written estimate of the probable expense of executing it and keeping it in repair. The first of these requisites was decided to be imperative, and a contract unsealed was consequently held inoperative against the Board and the rates. But the provision which required an estimate, was held to be merely a direction or instruction for the guidance of the Board and not a condition precedent essential to the validity of the contract: *Hunt v. Wimbledon Local Board* (2), *Eaton v. Basker* (3), *Brooks v. Torquay* (4), *British Insulated Wire Co. v. Prescot* (5), *Nowell v. Worcester* (6) and *Bonar v. Mitchell* (7). This meets completely the argument of the appellants that if any of the provisions of Rule 98 be deemed mandatory, the same character must be imputed to all its provisions. The view we take is supported by the principles deducible from the decisions in *Ashbury Ry. Co. v. Riche* (8), *Chasteauneuf v. Copeyron* (9) and *Young v. Mayor of Royal Leamington Spa* (10). In the case last mentioned, the House of Lords ruled that section 174 of the Public Health Act, 1875, which enacts that every contract made by an Urban authority, whereof the value or amount exceeds £50, shall be in writing and

(1) (1854) 4 C. B. (N. S.) 576. (6) (1854) 9 Exch. 457;

(2) (1878) 4 C. P. D. 42. 96 R. R. 793.

(3) (1881) 7 Q. B. D. 529. (7) (1850) 5 Exch. 415.

(4) [1902] 1 K. B. 601. (8) (1875) L. R. 7 H. L. 653

(5) [1895] 2 Q. B. 463. (9) (1892) 7 App. Cas. 127.

(10) (1883) 8 App. Cas. 517.

sealed with the Common Seal of such authority, is obligatory and not merely directory. Lord Bramwell observed: "the Legislature has made provisions for the protection of rate-payers, share-holders and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities, which involve deliberation and reflection. That is the importance of the seal. It is idle to say, there is no magic in a wafer. It continually happens that carelessness and indifference on the one side and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into. The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement." A similar view has been taken in a long line of cases in the Courts of the United States, where the principle has been repeatedly affirmed that if the charter or constituent act of a Corporation prescribes a particular mode in which the property of the Corporation shall be disposed of, that mode must be pursued: *Platter v. Elkhart County* (1), *Crow v. Warren County* (2) and *Shimer v. Phillipsburg* (3). The point was discussed with characteristic clearness and striking logical force in able and interesting opinions by Field, C. J., in what are known as the City Slip Cases in California where it was ruled that sales of real estate belonging to the city by its officers, under the authority of an ordinance not adopted in accordance with statutory requirements, were void and did not pass title to the purchasers: *McCraken v. San Francisco* (4), *Grogan v. San*

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(1) (1885) 103 Ind. 360,
2 N. E. 644.

(2) (1888) 118 Ind. 51,
20 N. E. 642.

(3) (1896) 59 N. J. L. 295;

33 Atl. 852.

(4) (1860) 16 Calif. 591.

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Francisco (1), and *Pimental v. San Francisco* (2). There is thus no escape from the position that neither the sale certificate nor the release has operated to transfer title to the appellants.

It is further clear that they do not constitute even a valid contract for sale, because Rule 103 requires that every contract or agreement entered into by any District Board in respect of a sum or involving a value above Rs. 500 shall be sanctioned at a meeting, be in writing, be signed by the Chairman and two other members of the District Board and shall be sealed with the Common Seal of such District Board. The rule adds that unless so sanctioned and executed, such contract shall not be binding on the District Board. It has been finally argued that the objection to the title of the appellants should not have been allowed to prevail, as the sale was admitted [*Satyesh v. Dhunpul* (3)] and that, at any rate, the trial should have been postponed to enable the appellants to complete their title by securing a duly executed instrument from the District Board : *Gunpat v. Adarji* (4). There is no force in either of these contentions. The appellants came into Court as plaintiffs and must succeed on proof of a valid title. Their title was challenged by the defendants, and though the factum of the sale by auction was admitted, it was asserted that the title had not been transferred thereby. The appellants had ample opportunity to produce a properly executed conveyance from the District Board, if they could, but they have not done so. The case before us clearly does not fall within the class of decisions where it has been ruled that a suit need not be dismissed merely because the authority for its institution, such as a certificate under the Pensions Act, 1861, or

(1) (1861) 18 Calif. 590.

(2) (1863) 21 Calif. 351.

(3) (1896) I. L. R. 24 Calc. 23.

(4) (1877) I. L. R. 3, Bom 312.

section 78 of the Land Registration Act, or, section 60 of the Bengal Tenancy Act, or, section 4 of the Succession Certificate Act is not produced with the plaint. The cases on this subject will be found reviewed in the judgment of this Court in *Sarat Chandra v. Apurba Krishna* (1) and need not be re-examined here. They are distinguishable, as the plaintiffs here had no title at all at the date of the institution of the suit. We hold accordingly that the District Judge has correctly found that Ramsundar Saha had no enforceable title at the date of the commencement of his suits, which must be deemed to have been rightly dismissed. The inference follows that the title to the land in dispute is still vested in the District Board, and we must, consequently, examine the rights of Ramkumar Saha against that body, which form the subject of enquiry in his suit.

There is no controversy upon one fundamental point, namely, that after the land in dispute had become vested in the District Board, they abandoned the project to excavate a tank and obtained the sanction of the Local Government to retransfer the land to the original owner. The question is whether there is a valid contract for such transfer enforceable at the instance of Ramkumar Saha against the District Board. It cannot be disputed that there was an offer by the District Board to Ramkumar Saha on the 31st August 1898, to reconvey the land to him upon payment of Rs. 25 as actual expenses of acquisition and that the offer was accepted by him when he made the requisite deposit on the 6th September 1898. This plainly constituted an enforceable contract. Rule 102 of the statutory rules provides that every contract made by or on behalf of a Board in respect of a sum or involving a value exceeding Rs. 50 shall be in

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writing and shall be signed by the Chairman or Vice-Chairman of the Board. As the contract in this case was for re-transfer of the land for Rs. 25, neither Rule 102 nor Rule 103, which apply respectively to contracts in excess of sums of Rs. 50 and Rs. 500, has consequently any application, but we know that the offer of the 31st August 1898 was, as a matter of fact, signed by the Vice-Chairman. It has not been proved that the Vice-Chairman had no authority to make this particular offer; no copy of the rules, if any, framed by the District Board under section 32 (e) of the Bengal Local Self-Government Act as to the powers to be exercised by the Chairman or Vice-Chairman, has been produced. We must assume that the Vice-Chairman was competent to make the offer, specially, as his act has never been specifically repudiated in these proceedings. The document whereby the original offer was made, is apparently not in existence, and the draft copy kept in the office has been produced; it is consequently impossible to say, whether the original bore the seal of the District Board; but if a seal is necessary, it is to be presumed, as Lord Denman says in *Doedem Pennington v. Taniere* (1), against the Corporation that everything has been done that was necessary to make it a binding contract upon both parties. The Statutory Rules, however, do not expressly require that a contract of this description should be sealed. The omission to affix the seal would not, therefore, affect the validity of the contract. The strict rule of the ancient Common Law, no doubt, was that a Corporation could only act under its seal and was not bound by written contracts not under seal. This rule, however, was relaxed in many cases at an early date, and where a Corporation is acting within the scope of the legitimate purposes of its institution

even parol contracts made by its authorised agents raise implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the Corporation : 6 Vin. Abr. 267 ; 1 Wms. Saund. 615, 616 ; 1 Blackstone Com. 475 ; *Lawford v. Billerica Rural Council* (1), *Douglass v. Rhi Urban District Council* (2) ; *Melbourne Banking Corporation v. Brougham* (3) ; *Bank of Columbia v. Patleson* (4). This is borne out by the statement of Fry in his classical treatise on Specific Performance of Contracts, 1913, section 618 : "It appears to be clear that such part performance as will prevent an ordinary defendant from setting up the defence of the Statute of Frauds, will prevent the defendant company from setting up either that defence or a defence grounded on the absence of the corporate seal or of the statutory formalities in accordance with which the company may be enabled to contract." This

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to the judgment of Neville, J., in *Hoare v. Kingsbury Urban Council* (1), which shows that the exception based upon the doctrine of part performance cannot be applied where, as in *Frend v. Dennett* (2), and in *Young v. Corporation of Leamington* (3), the contract is, by statute positively required to be under seal; to hold otherwise would in effect be, as Lindley L. J. said [*Young v. Corporation of Leamington* (4)], to repeal the Act of Parliament and to deprive the rate-payers of that protection which Parliament intended to secure for them. In the case before us, however, the Statutory Rules do not render a seal necessary for the validity of this class of contracts, and the doctrine of part performance may well be applied; the District Board have had the benefit of the money paid by Ramkumar Saha and have allowed him to remain in occupation of the land and to incur expenditure thereon for many years on the basis of the contract. It is worthy of note that the contract in this case is not *ultra vires* in the sense that it is beyond the scope of the authority of the District Board as a Corporate Body under any circumstances; such contract is not affected by the class of decisions, whereof *Ashbury Ry. Co. v. Riche* (5) may be taken as the type. We hold accordingly that there was an enforceable contract on the 6th September 1898.

Two questions next require consideration, namely, *first*, has there been an implied rescission of this contract by a substituted agreement; and, *secondly*, has there been an implied rescission of the contract by abandonment. As regards the first point, we have to bear in mind that, subsequent to the agreement of

(1) [1912] 2 Ch. 452.

(3) (1883) 8 App. Cas. 517, 522.

(2) (1858) 4 C. B. (N. S.) 576;

(4) (1882) 8 Q. B. D. 579, 585.

5 L. T. 73; 114 R. R. 859.

(5) (1875) L. R. 7 H. L. 653

the 6th September 1898, an offer was made to Ramkumar Saha by the Collector on behalf of the District Board on the 27th November 1900 to re-transfer the entire land to him (inclusive of the land acquired from him as also from others) if he would make the required deposit. He may be deemed to have accepted this offer on the 4th December 1900, when he paid into the Treasury the amount demanded. What, then, was the legal effect of this transaction; did it amount to an implied rescission of the original agreement by a substituted agreement? The answer must be in the negative, *first*, because the second agreement was only more comprehensive than, but in no way inconsistent with, the first agreement; and, *secondly*, because, the second agreement was inoperative in law.

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As regards the first point, it is well-settled that a contract need not be rescinded by an express agreement to that effect; if the parties make a new and independent agreement concerning the same matter the latter may be construed to discharge the former, when the terms of the latter are so inconsistent with those of the former that they cannot stand together: *Gilbert v. Hall* (1). The true principle is that one contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former; but if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless and until it is performed: *Hunt v. South Eastern Ry. Co.* (2), *Dodd v. Churton* (3), *Patmore v. Colburn* (4), and

(1) (1831) 1 L. J. Ch. 15.

(3) [1897] 1 Q. B. 562.

(2) (1875) 45 L. J. C. P. 87.

(4) (1834) 1 Cr. M. & R. 55.

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Thornhill v. Neats (1). The same view has been adopted in the Courts of the United States *Drown v. Forrest* (2), *Rhoades v. Chesapeake Ry. Co.* (3) and *McDaniels v. Robinson* (4). It is further well-settled that where parties enter into a contract, which, if valid, would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction. As observed in Willes, J., in *Noble v. Ward* (5), this is in accordance with a series of cases which will be found referred to in the second of the Egremont Cases, *Doe dem. Biddulph v. Poole* (6). A similar view was taken in *Britt v. Aylett* (7). In the case before us, the second agreement was inoperative in law, as it contravened the provisions of Rule 103 of the Statutory Rules previously mentioned. We cannot, consequently, hold that the original agreement of the 31st August 1898 was, by implication, rescinded by the subsequent agreement of the 4th December 1900.

As regards the second point, we have to consider whether the agreement of the 6th September 1898 was impliedly rescinded by abandonment, when Ramkumar Saha applied to the District Board, on the 24th April 1904, 9th June 1907 and 12th August 1907 for return of the sum previously paid by him; for, there is no dispute that where one party, by acts and conduct, evinces an intention no longer to be

- (1) (1860) 8 C. B. (N. S.) 831. (5) (1857) 4 H. & C. 149;
- (2) (1891) 63 Vermont 557, L. R. 1 Exch 177; L. R. 2
14 L. R. A. 80. Exch. 135; 143 R. R. 531.
- (3) (1901) 49 W. Va. 594; 87 Am. (6) (1848) 11 Q. B. 713;
St. Rep. 826; 55 L. R. A. 170. 75 R. R. 607.
- (4) (1854) 26 Vermont 316; (7) (1850) 11 Arkansas 475;
52 Am. Dec. 574 52 Am. Dec. 282.

bound by the contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract. The rule on this subject was formulated by Lord Coleridge, C. J., in *Freeth v. Burr* (1): "where the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which, I think, the decision in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is, as I have stated, namely, that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." This exposition has been twice affirmed by the House of Lords. In *Mersey Steel and Iron Co. v. Naylor Benzon & Co.* (2) Selborne, L. C., said: "you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." In the same case, Lord Blackburn added: "where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, if you go on and perform your side of the contract, I will not perform mine, that in effect amounts to saying "I will not perform the contract." To the same effect is the observation of Lord Collins

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in *General Billposting Co. v. Atkinson* (1): "the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." As renunciation is thus based on an absolute abandonment of the contract, it follows, as Bowen, L. J., said in *Boston Deep Sea Fishing Co. v. Ansell* (2), that a rescission of the contract implies that you relegate the parties to the original position they were in before the contract was made; that cannot be where half the contract has been performed. It is also well-settled that the Court insists upon clear and precise evidence of a mutual intention to determine and abandon the contract: *Robinson v. Page* (3) and *Buckhouse v. Crosby* (4)." Sugden, L. C., said in *Carolan v. Brabazon* (5): "the Court requires as clear evidence of the waiver as of the existence of the contract itself, and will not act upon less." To the same effect is his observation in *Moore v. Crofton* (6). Smith, M. R., in *Clifford v. Kelly* (7) and in *Cartan v. Bury* (8), quotes with approval the statement of Lord St. Leonards in his celebrated work on Vendors and Purchasers (1862), Ch. 4, section 9, para. 3, p. 168: "An abandonment of the whole agreement, clearly made out (for the Court will look at the evidence with great jealousy), is a good defence in equity:" *Brophy v. Connolly* (9), *Chambers v. Betty* (10), *Homan v. Skelton* (11), *Chubb v. Fuller* (12), *Lloyd v. Collett* (13), *Reynolds v. Nelson* (14), *Garrett v.*

(1) [1909] A. C. 118, 122.

(7) (1858) 7 Ir. Ch. Rep. 333.

(2) (1888) 39 Ch. D. 339, 365.

(8) (1860) 10 Ir. Ch. Rep. 387, 400.

(3) (1826) 3 Russ. 114; 27 R. R. 26.

(9) (1857) 7 Ir. Ch. Rep. 173.

(4) (1737) 2 Eq. Cas. Abr. 32.

(10) (1815) Beatty 488.

(5) (1846) 3 J. & L. 200, 209; 9 Ir. Eq. Rep. 224

(11) (1860) 11 Ir. Ch. Rep. 75, 97.

(6) (1846) 3 J. & L. 438, 445; 7 Ir. Eq. Rep. 344

(12) (1858) 4 Jur. N. S. 153.

(13) (1793) 4 Brown C. C. 469.

(14) (1821) 6 Madd. 8;

22 R. R. 225.

Besborough (1), *Cubitt v. Blake* (2) and *Earl of Rosse v. Sterling* (3). Now let us examine the relative situation of the parties in the light of these principles. The applications by the plaintiff for return of his money do not state explicitly that he wished to rescind the contract. His conduct, indeed, was inconsistent with any such possible implication; he did not offer to quit possession of the land on receipt of the money. In fact, if he rescinded the contract and gave up the land, he would be entitled not only to a return of his money but also to compensation assessed under the Land Acquisition Act. The Chairman, when he recorded the order for return of the money, no doubt, noted that if the plaintiff took back the money, he might find himself estopped in his attempt to enforce the contract not, indeed, the earlier contract, but the later agreement which formed the basis of the unexecuted draft conveyance; in any event, his remarks show that he, at any rate, thought that there was a subsisting contract between Ramkumar Saha and the District Board. But whatever the result might have been, if the plaintiff had actually received back his money, the incontestable fact remains, that the amount has not yet been paid to him. The order of the Chairman was never communicated to him: the money has never been tendered, much less actually paid to him. The District Board have never sought to obtain possession of the land from him, as they would unquestionably be entitled to do on a rescission of the contract. The plain truth is that whatever may have been recorded on paper, both parties have conducted themselves as if there had been no rescission; they have not been relegated to the original position they

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(1) (1839) 2 Dr & Wal. 441; (2) (1854) 19 Beav. 454;

2 Ir. Eq. Rep. 180. 105 R. R. 209.

(3) (1810) 4 Dow 442.

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occupied before the contract was made. Their conduct has been inconsistent with the theory of rescission, and when for the first time, more than a year after the order for refund had been recorded by the Chairman, the District Board attempted to sell the land as if they were emancipated from continued liability under the contract, the plaintiff forthwith protested and relied upon the contract, and there is no room for doubt that whatever might have been said, nothing had been done, up to that stage, on either side, on the hypothesis that the contract had been abandoned. The demand of a return of the deposit is not by itself conclusive evidence of an intention to abandon the contract; but where, as in *Whalen v. Stuart* (1), such demand is accompanied by other conduct consistent only with an intention to rescind, the vendee who has so acted cannot later seek specific performance, for, as has been said, a non-existent contract cannot be specifically enforced. We hold accordingly that the conduct of the parties does not show that the contract was rescinded, and it has not been urged that, apart from this, the conduct of the plaintiff has been such that though it does not amount to rescission, it still disentitles him from insistence on specific performance, as was held in *Price v. Assheton* (2) and *Price v. Dyer* (3). The conclusion follows that, at the date of the institution of this suit, there was a valid contract specifically enforceable by the plaintiff against the District Board.

No question of limitation obviously arises under Article 113 of the Schedule to the Indian Limitation Act, as the plaintiff had notice, for the first time, on the 22nd February 1909, that the performance was

(1) (1909) 194 N. Y. 495;
87 N. E. 819.

(2) (1834) 1 Y. & C. Exch 82;
41 R. R. 222.

(3) (1810) 17 Ves. 356; 11 R. R. 102.

refused, and the suit was instituted within three years from that date.

The question next arises, whether the plaintiff is entitled to the assistance of the Court in any other manner. The District Judge has made in his favour a conditional decree for recovery of Rs. 992-11-1 from the District Board. In the view we take of the right of the plaintiff to enforce specific performance of the contract of the 6th September 1898, it is plain that this decree must be modified. The plaintiff is not entitled to a return of the sum of Rs. 25 paid on the 6th September 1898; but he is entitled to a return of the sum of Rs. 957-11-1 paid on the 4th December 1900 when he accepted the second offer. The second agreement, as we have already seen, is not enforceable and never superseded the original contract. Consequently, the District Board are not entitled to retain the money paid by the plaintiff thereunder. It cannot be disputed that where a Corporation receives money or property under an agreement, which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation: *Rankin v. Emigh* (1). This is good sense and based on sound principle. The relief is granted, not upon the illegal contract, nor according to its terms, but on an implied contract of the Corporation to return, or failing to do that, to make compensation for property or money which it has no right to retain; to maintain such an action is not to affirm but to disaffirm the illegal contract: *Central Transport Co. v. Pullman Palace Car Co.* (2). As Baggally, L. J., said in *Chapleo v. Brunswick Building*

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Society (1), if the company has received the benefit of the payment, if, for instance, that amount has found its way to the credit of its banking account, the plaintiff might have been enabled to establish a claim against the company to the extent of the benefit derived by it from the transaction : *Lawlord v. Billericay Rural Council* (2) and *Dougliss v. Rhyl Urban District Council* (3). In the case before us, the plaintiff is clearly entitled to a return of Rs. 957-11-1 together with interest thereon from the date of deposit to the date of realisation.

One other question requires consideration, namely, whether the plaintiff is entitled to relief against the District Board by way of cross-objections to the decree in an appeal preferred by the other defendants. It need not be disputed that as an ordinary rule, a respondent in an appeal is not entitled to urge cross-objections except as against the appellant: *Bishun Churn v. Jogendra Nath* (4), *Sabiuddin v. Deomoorat* (5), *Kallu v. Manni* (6), *Jadunandan v. Deo-Narain* (7), *Nur ey v. Harrison* (8) and *Abdul Ghani v. Muhammad* (9). But rule 22(3) of Order XLI of the Code of 1908 has materially altered the pre-existing law by substitution of the words "party who may be affected by such objection" for the word "Appellant" contained in section 561 (3) of the Code of 1882. It may further be observed that Rule 33 of Order 41 has conferred wide discretionary powers on the Court of Appeal to alter the decree of the Court below as the case may require. In the case before us,

(1) (1881) 6 Q. B. D. 696.

(6) (1900) I. L. R. 23 All 93.

(2) [1903] 1 E. B. 772, 786.

(7) (1911) 15 C. L. J. 61;

(3) [1913] 2 Ch. 407.

16 C. W. N. 612.

(4) (1898) I. L. R. 26 Calc. 114.

(8) (1913) I. L. R. 37 Bom 511;

(5) (1903) I. L. R. 30 Calc. 655.

15 Bom. L. R. 781.

(9) (1905) I. L. R. 28 All 95.

the Saha defendants, who are appellants in this Court, have attacked even the conditional decree made by the District Judge in favour of the plaintiff; the appeal, in fact, re-opens the whole matter in controversy and calls upon the Court to re-examine the questions in dispute from all possible points of view. That appeal has been supported by the District Board respondent. The plaintiff-respondent has been constrained, with a view to ensure his safety, to take cross-objections, which, if successful, would make his title unassailable. These objections, no doubt, primarily touch the co-respondent, but that co-respondent has throughout supported the defendants-appellants against the plaintiff-respondent. No question of surprise arises, as every party has been given full notice and opportunity to place his own case before the Court in its true bearing. The circumstances are thus obviously of a very special character; the District Board has decided to part with the land acquired for a purpose which has fallen through. The substantial question is whether relief should be granted in respect of that land to the original owner or to the subsequent purchaser. If we allow the cross-appeal, though relief is granted in form against the District Board, the ultimate result is that the title of the original owner is secured as against the subsequent purchaser. In these peculiar circumstances, it is in no sense unjust that effect should be given to the cross-objections. There is no answer to the cross-objections on the merits, while the appeal itself is, as we have seen, groundless. The cross-objections must, consequently, succeed, while the appeal cannot be sustained.

We may add that even if we had declined to entertain the cross-objections, and had merely dismissed the appeal, the practical result would have been identical with what will be the consequence of our decree. The

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plaintiff Ramkumar Saha has been in undisturbed possession of the land all along, notwithstanding the acquisition. His possession became adverse to the Board on the 21st February 1898; consequently, he acquired an indefeasible title on the 21st February 1910. If the conditional decree made by the District Judge be maintained, the plaintiff need never take back the deposits, but he will be entitled to receive from the Collector the compensation awarded under the Land Acquisition Act. The plaintiff thus achieves the end he has in view, namely, retention of possession of the land; that possession can no longer be disturbed by the District Board. Counsel for the District Board fully appreciated the difficulties of the situation: he complained that the decree of the District Judge is ineffectual for his purposes, as it does not entitle the District Board to recover possession of the land by execution and on payment of the decretal amount to the plaintiff. The obvious answer is that the decree cannot be modified, in the way suggested, in favour of the District Board; the Board are not the plaintiffs in the suit, and have never chosen to appeal against the decree made by either Court.

We have finally to consider the question of costs. In the three appeals in which the decree of the District Judge is affirmed, the appellants will pay the costs of the respondents in this Court. In the other appeal, in which the appeal is dismissed and the cross-objections allowed, the appellants will also pay the costs of the plaintiff-respondent. But the costs of the plaintiff, both in the primary Court and in the Court of the District Judge, should, in our opinion, be paid by the District Board: *Thornhill v. Weeks* (1). The history of this protracted litigation proves conclusively that the whole difficulty has been created by the utterly

unbusinesslike manner in which the transactions reviewed by us have been carried on ever since 1898 by the District Board of Chittagong. There is no exaggeration whatever in the quaint observation, embodied in one of the office notes in the record, that this matter "remained to be decided from a long time owing to different opinions of different officers." One can only hope that the long delay and uncertainty, which have characterised the proceedings of the Board in this particular matter, furnish but a solitary instance of the way in which business is transacted by a Corporation created for purposes of public utility. The net result to the plaintiff has been that though his land was acquired under very doubtful circumstances in 1898, he has had to wait for more than 18 years to get back his property, notwithstanding that he has, in the interval, responded promptly to every demand of the District Board.

The result of our decision may now be summarised. Appeals Nos. 1979, 1981 and 1981 of 1912 are dismissed with costs. Appeal No. 1243 is dismissed, but the cross-objections therein are allowed and the decree of the District Judge discharged. In lieu thereof, we direct that the suit (435 of 1909) out of which that appeal arises, do stand decreed in the manner following. The plaintiff Ramkumar Saha is awarded a decree for specific performance of the contract of sale of the land mentioned in the schedule to the plaint, as against the District Board of Chittagong; the Board is directed to execute a conveyance in his favour in accordance with law. On failure of the Board to execute the conveyance, the plaintiff will be at liberty to proceed in accordance with Order 21, Rules 32 and 34 of the Code. The possession of the plaintiff will be confirmed, and should it transpire that he has been dispossessed, he will be restored to possession in

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execution of the decree of this Court, as explained in *Madan Mohan v. Gaja Prasad* (1) and *Fateh Chand v. Narsing Das* (2). The plaintiff will, in addition, have a decree, against the District Board, for Rs. 957-11-1 together with interest thereon at 6 per cent. per annum from 4th December 1900 to the date of realisation. The plaintiff will have his costs in the Courts of the Subordinate Judge and the District Judge from the District Board, and his costs in this Court from the other defendants. A self-contained decree, which will set out the various sums in detail, will be drawn up in this Court.

It has been brought to our notice that the District Board have not been correctly described in these proceedings in accordance with section 20 of Bengal Act III of 1885. The cause title of the plaint will accordingly be amended and the expression "District Board of Chittagong" will be substituted for "the Chairman of the District Board, Chittagong."

(1) (1911) 14 C. L. J. 159.

(2) (1912) 22 C. L. J. 383.

S. K. B.

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APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J., Woodroffe and Mukerjee JJ.

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*Appeal—Questions of Fact—Weight to be given to the opinion of Trial Judge
—Duty of Court of Appeal—Practice—Broker's Commission.*

Decision of a Judge sitting on the Original Side decreeing a claim for commission reversed on appeal on questions of fact [SANDERSON C.J. dissenting].

Principles guiding the Court of Appeal in dealing with the findings of fact arrived at by a Judge of the Court of first instance discussed.

APPEAL by defendant Laljee Mahomed, from the judgment of Greaves J.

In this suit the plaintiff, Dadabhai Jivanji Guzdar as assignee of one Moses Judah, claimed to recover from the defendant the sum of Rs. 2,000 alleged to be due as commission to Moses Judah. It appears that Laljee Mahomed, who was the Managing Director of the Laljee Oil Mills Company Limited, advertised the Mills for sale in the *Calcutta Exchange Gazette* at the end of May or the beginning of June 1911. On the 13th June 1911, the defendant gave Moses Judah, who was a broker, a letter in the following terms : " I agree to allow you to sell my above Oil Mill at Rs. 40,000 only. You will get brokerage 5 per cent on the same when the said mill will be sold through you. This condition in force till fortnight (15 days) from date." The defendant signed this document in Nagri and added

* Appeal from Original Civil No. 39 of 1915, in suit No. 602 of 1912.

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certain words in Guzerati, the correct translation of which was "on the sale proceeds being received in hand, brokerage will be paid."

On the 25th June 1911, the defendant received a letter from one Batuknath Boodhnath in the following terms : " I see in the *Exchange Gazette* that you are going to sell your Oil Mill at Narcoldanga. I went twice to your office, but unfortunately could not find you there. I shall, however, call at your Oil Mill tomorrow with an expert Engineer's opinion and will give you offer for the same. I may buy for myself or sell to my friends." This was followed by a letter dated the 26th June from Batuknath to the defendant, as follows : " As per our conversation with your Mr. Laljee Mahomed we intend to purchase the above mills . . . at a cash price of Rs. 35,000 on the following condition . . ." The condition was stated and an alternative offer made of Rs. 40,000 on certain terms.

On the 8th August 1911, Batuknath agreed to purchase the property for the sum of Rs. 40,000, the payment to be Rs. 10,000 cash on registration and the balance by hundis. The purchase was completed on the 27th September 1911.

Moses Judah claimed from the defendant the sum of Rs. 2,000 by way of commission in respect of the sale under the terms of the letter of the 13th June 1911 and on being refused payment brought this action. He died during the pendency of the action, and the appellant by virtue of an assignment from the executrix of the deceased was substituted as plaintiff.

The plaintiff's case was that Judah introduced the purchaser Batuknath to the defendant and induced him to consent to pay the sum of Rs. 40,000 for the mills, and that this occurred within the fifteen days allowed by the letter, though the sale was not completed till a later date. Batuknath supported the

plaintiff's case. The defendant denied that Judah had acted as broker in the transaction, and relied mainly on the correspondence and on the circumstance that he had allowed the purchaser "brokerage" at $\frac{1}{2}$ per cent.

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The case came on for hearing before Greaves J., who accepting the evidence of Batuknath, found that the sale to Batuknath was effected through the instrumentality of Judah and that the plaintiff was entitled to the commission claimed and decreed the suit in favour of the plaintiff.

From this judgment the defendant Laljee Mahomed appealed.

Mr. S. C. Mookerjee (with him *Mr. S. K. Roy*), for the appellant. On the proper construction of the letter of the 13th June 1911, commission was payable only in the event of the sale being completed within 15 days: *Chapman v. Winson* (1), *Burchell v. Gowrie & Blockhouse Collieries, Ltd.* (2). Assuming it was sufficient that the purchaser should be secured within fifteen days, this has not been established. The learned Judge merely found that the sale was effected through the instrumentality of Judah without reference to the time limit. The finding itself was erroneous. In the face of the correspondence and the allowance of brokerage to the purchaser, the latter's evidence cannot be believed and should not have been accepted. *Stokes v. Soonder Nath D. Khote* (3) and *Kishan Prasad Sinha v. Parnendu Narain Sinha* (4) also cited.

Mr. Langford James (with him *Mr. S. Ghosh*), for the respondent. From the evidence of the purchaser Batuknath it is clear that Judah acted as the broker in

(1) (1904) 91 L.T. 17.

(2) [1910] A.C. 614

(3) (1898) I.L.R. 22 Bom. 540.

(4) (1911) 15 C.L.J. 40

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the transaction and induced him to purchase the property. The learned Judge has accepted Batuknath as a witness of truth, and his finding ought not to be interfered with. If Judah induced the purchase, from the correspondence, it is clear, he must have secured the purchaser within the fifteen days. That was all he was obliged to do under the letter of the 13th June and he was entitled to his commission. It was not necessary that the whole of the sale proceeds should be paid in cash.

SANDERSON C.J. In this case the plaintiff, as assignee, claims Rs. 2,000 which is alleged to have been due by way of commission to Moses Judah who has died since the suit was instituted.

The defendant being the owner of certain oil mills was anxious to sell them. They were mortgaged to a Bank for Rs. 35,000 and at the end of May or the beginning of June 1911, the mills were advertised for sale in the *Exchange Gazette*. On the 13th June 1911, the defendant gave Moses Judah a letter in the following terms and signed by the defendant: "I agree to allow you to sell my above oil mill at rupees forty thousand only. You will get brokerage 5 per cent. on the same when the Mill will be sold through you. This condition to be in force till a fortnight (15 days) from date." Then there were certain words which, it was agreed between the parties, were added at the time that letter was written, in Guzrati, and the correct translation was in these terms, "On the sale proceeds being received in hand, brokerage will be paid."

The first question is as to the meaning of the letter. To my mind, the meaning is pretty plain: in order to earn his brokerage Moses Judah was to introduce a purchaser who would be willing to give Rs. 40,000.

He had the opportunity of introducing such a purchaser and thus qualifying for his brokerage, for fifteen days only. I do not think that the letter means that the sale had to be completed within fifteen days, but it was essential for Moses Judah, if he was to earn his commission, that he was to introduce within fifteen days a person who would be ready and willing to purchase for Rs. 40,000. In other words, if he did so introduce a purchaser, the mere fact that the purchase was not completed until September would not deprive the broker of his commission.

Now, there is no question as to the law which governs such a matter as this. In my judgment, it is correctly stated by Mr. Justice Greaves at the bottom of page 75 of the paper-book. There he says, quoting from *Lord Halsbury's Laws of England*, "In order to entitle an agent to receive his remuneration, he must have carried out that which he bargained to do or at any rate, must have substantially done so and all conditions imposed by the contract must have been fulfilled."

The main question, therefore, in this case is whether M. Judah substantially carried out what he had bargained to do. This is a question of fact mainly dependent upon the evidence of the witnesses. The case was evidently tried with great care, and the learned Judge reserved his judgment. After due consideration he has accepted the evidence of Batuk-nath, the purchaser, and rejected that of the defendant; and, in a case such as this, where the matter depends to a large extent upon the verbal evidence of the witnesses, in my judgment, this Court ought not to interfere with the decision of the learned Judge save on very clear grounds; in other words, unless it is clear that a miscarriage of justice has taken place. The Judge who tried the case has had the advantage

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which we have not had, of seeing and hearing the witnesses, an advantage which in my experience it is almost impossible to overestimate. In this case I am not prepared to say that the learned Judge has decided wrongly; on the contrary I think there is sufficient evidence to justify the decision at which he arrived. On the material points he has accepted the evidence of Batuknath and rejected that of the defendant: and, in passing, I may say that the comments made upon the evidence of the defendant by the learned counsel for the plaintiffs were not without justification. Batuknath's evidence was to the effect that it was Moses Judah who introduced him to the defendant, and his evidence on one point is very significant: he says he did not want to pay more than Rs. 35,000, but he was persuaded by Moses Judah to offer Rs. 40,000 which was the price eventually agreed upon. Some of the passages in his evidence are at pages 36 and 37 of the paper-book; as for instance, where he says in cross-examination "Q.—Do you say it was Jndah who introduced you to Lalji Mahomed?" "A.—Yes, that is true." "Q.— You wanted to pay Rs. 35,000 not 40,000." "A.—Yes, that is true. I first offered Rs. 35,000 and Judah used to come and see me often and he got me into this scrape." Then he is asked what is the scrape. "A.— What could I do, I did not. I am telling you the truth, it was Judah who introduced me to the defendant; it was Judah through whom everything was settled in respect of this matter, and it was Judah who got me into this trouble." "The trouble is this:—I was made to agree to pay Rs. 40,000 for the Mill; it was not worth Rs. 13,000." "I did not want to buy it, but Judah persuaded me to take it. He introduced me to the defendant, pressed me to take it, and at last got me into this trouble." That being so, the plaintiff's

case is proved on one of the material points, namely, that it was through the instrumentality of Moses Judah that the purchase price, Rs. 40,000, was obtained. But it is said that there is nothing to show that Moses Judah introduced the purchaser and performed his part of the contract within the specified time, fifteen days. In my judgment, if Batuknath's evidence is accepted, as it was by the learned Judge, that it was through M. Judah that he was persuaded to offer Rs. 40,000, there is evidence that this must have been done within the time limit, because we find that on the 26th June, thirteen days from the date of the broker's letter, Batuknath wrote to the defendant in the following terms: "As per our conversation with your Mr. Laljee Mahomed we intend to purchase the above Mills together with the land connected with it at a cash price of Rs. 35,000 on the following condition." Then he set out the condition. The letter closed so "The alternative arrangement for payment is as follows:—Rs. 10,000 in cash at the time of the sale. Rs. 30,000 to be paid after one year," containing an offer, though it was an alternative offer, of Rs. 40,000 which he said he would never have made but for the instrumentality of Moses Judah. He must have seen the defendant that day, and such letter contains an offer of Rs. 40,000. It is true that the payment of part was to be deferred for one year, but that offer was the one which with a slight variation of the terms was eventually accepted in August. Consequently, Batuknath's evidence having been accepted by the learned Judge, the performance of the contract by Mr. Judah was within the time.

I am aware that the letters in the case afford matter for comment on Batuknath's evidence. For instance, the letter of the 25th of June, 1872, shows his having seen the advertisement in the

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Gazette. This is a legitimate comment, but it is not conclusive that Moses Judah did not introduce the purchaser. The matter had been advertised and it was quite possible that it was Moses Judah who brought the advertisement to the attention of the purchaser in the first instance. Again, the receipt for Rs. 200 where the payment is stated to be "brokerage" is a legitimate subject of comment, but I think the learned Judge's remarks on that transaction are not unreasonable, and, in any event, as between vendor and purchaser, the use of the word "brokerage" is quite unsuitable, whatever the nature of the transaction was. The main reason, however, which weighs with me is that the learned Judge has had to deal with conflicting verbal evidence on a question of fact; and after seeing and hearing the witnesses he has come to the conclusion that the truth lies on the side of Batuknath and not on the side of the defendant: and, in such a case, in my judgment, this Court should not interfere, unless it is clear that he has come to a wrong conclusion. This I am not prepared to say.

A further point has been raised, namely, that the plaintiff in any event cannot recover more than the commission on the amount actually received by the defendant in cash. In my judgment, this is not correct. The brokerage was to be paid when the "sale proceeds" were received. The purchase was completed on the 27th of September 1911, when the purchaser paid Rs. 10,000 in cash and gave *hundis* for Rs. 30,000. I agree with the learned Judge that the words in Guzrati added to the letter of the 13th June 1911 do not mean that the commission was only to be payable if and when the whole Rs. 40,000 were received in cash; and if the defendant chose to agree with the purchaser that the "sale proceeds" should

be partly cash and partly hundis, I do not think that that can affect the plaintiffs' right to commission.

In my judgment this appeal should be dismissed.

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WOODROFFE J. The plaintiff as the assignee of one Judah sues to recover commission alleged to be due to him under a written agreement dated 13th June 1911 for having effected through his agency the sale of certain oil mills. It must be shewn that the conditions of the contract have been complied with. The onus of proving this is on the plaintiff. This is of importance in the present case, for in regard to the particular question on which I mainly rest my judgment, viz., whether it has been shewn that Judah obtained the purchaser within fifteen days of and in terms of the agreement it has been argued by Mr. Langford James for the appellant that this was not at issue in the lower Court. There is no finding on this particular point. It was, however, not necessary to put this specifically in issue since the onus of proving all facts necessary to establish the claim was on the plaintiff and the defendant put in issue the allegation that the purchase was effected by Judah in terms of the agreement according to the conditions of which alone he was entitled to a commission.

Several questions arise upon the construction of the agreement. It has been argued for the respondent that it is sufficient if a purchaser was secured within fifteen days even if the actual purchase was completed later. This the appellant denies contending that commission was payable only in the event of the transaction being completed (which it was not) within fifteen days; and nextly that brokerage was only payable on the sale proceeds being received in cash (which was not the case) within this period.

The appellant's contention is not without force on

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both these grounds, but it is not necessary to go into this matter, for whatever be the true construction of the document on these points it is clear and is, indeed, conceded that whenever or in what way the sale was concluded the purchaser at such sale must have been secured by the broker within fifteen days of the agreement. Now the agreement was dated the 13th June 1911 and admittedly the first proved date at which vendor and purchaser were in communication was the 25th June when twelve days under the agreement had already run by. It must be shewn then that within the remaining three days Judah found the purchaser. Has this been shewn? In cross-examination the purchaser was asked whether his letter of the 25th June was written before or after his introduction to the defendant and whether Judah asked him to write to the defendant or not. He was again asked about this matter in re-examination and he replied that he did not remember the date nor even the month when Judah spoke to him about this letter and that he could not say whether it was before or after this letter that Judah spoke to him. Had it been the fact that it was due to Judah's intervention that the first letter was written it does not seem to me possible that the witness could have forgotten it. His answer must have been in that case that he must have seen Judah first, for before seeing him he had known nothing of the defendant or of his property. He will not commit himself to this, and I think for the reason that he had not then seen Judah but had learnt about the property through an advertisement in the *Gazette*. This is indicated by the words in the letter of the 25th, "I see in the *Exchange Gazette* that you are going to sell." The purchaser also in his evidence says, "I saw the *Exchange Gazette* and then I wrote that letter," not that he had seen Judah meanwhile

or at all. Though the omission of Judah's name from the letter may not be conclusive it is certainly evidence against the plaintiff for a reference to the broker through whom it is suggested that the purchaser came to know of the property might have been expected. There is no specific evidence that Judah secured the purchaser between the 26th and 28th or the conclusion of the period allowed to him. There is some general evidence that he introduced the purchaser which in any case is scarcely accurate if the first communication of the 25th to which I have referred was without his intervention. The evidence, however, is not such as I can accept. Doubtless, in a case of this kind great weight must be attached to the judgment of the learned Judge who heard the case; but, in the present instance, we have no finding on the specific point and the uncorroborated evidence of the purchaser on which the learned Judge has relied is, upon the most favourable view, consistent with the fact of work done after the limited period and is in my opinion in conflict with and unsupported by the documentary evidence in the case and the inferences to be derived therefrom. As stated, the first letter of the 25th indicates that it was the advertisement which first put the parties in communication. There is no mention of Judah as broker in any of the letters until we get to the letter of 15th November 1911 which is of doubtful admissibility against the appellant. But on the merits the letter comes too late to be of value and is open to the suspicion that evidence was then being made for the claim by Judah which followed it in January.

It is remarkable also that there is no letter or other document by the broker which establishes his claim. Had he earned his commission in terms of the agreement I think he would have been careful to put it on

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record. The solicitor Mr. E. O. Moses, who acted in the sale as attorney for the vendor, states that he never heard that Judah was the broker in the transaction. The purchaser also in his evidence says he never mentioned the matter to any one. Finally, there is evidence that the purchaser Batuknath took a commission of $\frac{1}{4}$ per cent. on the entire sale proceeds of Rs. 40,000 on the ground that there had been no broker in the sale. He further granted a receipt for the same in which express reference is made to "Amount of brokerage." The purchaser knows some English and though asked to give an explanation of this circumstance was unable to do so. Mr. Justice Greaves has held that this was a rebate, an explanation which the witness himself has not ventured to give. But, assuming that it was, the point is that it was allowed because no broker had been employed. If so, then this directly contradicts the purchaser-witness when he says that Judah was to his knowledge the broker. Nor is it likely that the defendant would have agreed to make a further payment for "brokerage" if he was already indebted for considerable brokerage to Judah. For these reasons, I would allow this appeal. It is possible that what may have happened is that the defendant advertised his property and then Judah coming in this way to know of it got the agreement of agency from the defendant. After that, and independently of Judah, the purchaser learnt from the *Gazette* that the property was for sale and entered into communication with the vendor; Judah who may have heard of this, may, some time between June and August (for it is to be observed that the sale was not concluded till the latter date) have pressed the purchaser to buy in the hopes of putting forward a claim for commission. But this would not be sufficient. It is, however, not necessary for me

to hold anything more than that the plaintiffs have not established that Judah earned his commission within the terms of the agreement, and I would, therefore, decree this appeal with costs and dismiss this suit with costs. As regards the question whether we should interfere on appeal with questions of fact I will only say this that if after argument the Court has a conviction that the judgment under appeal is erroneous it should not be affirmed and this is not the less so because the judgment raises a question of fact. The mode in which the conviction is brought about in matter of law and fact is a question into which I do not enter, it being sufficient in the present case to say that, in my opinion, the appellant has shown circumstances under which the judgment under appeal should be reversed.

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MOOKERJEE J. This is an appeal by the defendant in an action by an agent against his principal for recovery of commission. The defendant employed the plaintiff to sell his oil mill; the agreement was made on the 13th June, 1911, and was embodied in a letter in the following terms: "I agree to allow you to sell my above oil mill at Rs. 40,000 only; you will get brokerage 5 per cent. on the same, when the mill will be sold through you; this condition in force till fortnight (15 days) from this date." There was a postscript to the effect that "on the sale proceeds being received in hand, brokerage will be paid." On the 25th June, 1911, one Batuknath Boodhnath wrote to the defendant: "I see in the *Exchange Gazette* that you (are) going to sell your oil mill at Narealdanga. I went thrice to your office, but unfortunately could not find you there. I shall, however, call at your oil mill to-morrow, with an expert Engineer's opinion, and will give you offer for the

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same. I may buy for myself or sell to my friends." On the next day, the intending purchaser again wrote to the defendant. The letter referred to a conversation which the writer had with the defendant and contained two alternative offers. The first alternative was the purchase of the mill for Rs. 35,000 cash, Rs. 1,000 to be deposited thereout as earnest money, and the balance to be paid after one month, if on trial working meanwhile, the mill turned out to be satisfactory. The second alternative was the purchase of the mill on payment of Rs. 10,000 in cash at the time of sale, and Rs. 30,000 to be paid after one year. It may be observed parenthetically that neither of these offers accorded with what the seller expected, namely, Rs. 40,000 in cash. What followed does not transpire from the correspondence, but we find that on the 8th August 1911, the purchaser wrote to the defendant and confirmed an arrangement made on the day previous for the sale of the mill for Rs. 40,000, Rs. 10,000 to be paid in cash on registration of the conveyance, Rs. 20,000 by a *hundi* payable one year after that date, and the balance of Rs. 10,000 by another *hundi* payable 18 months after the date of the registration of the conveyance. On the 15th November 1911, nearly two months after the sale had been completed on the 27th September, the purchaser is said to have written a letter to the plaintiff and authorised him to negotiate for the appointment of Managing Agents of the mill, which is described as "purchased through you." On the 26th January 1912, the solicitors of the plaintiff wrote to the defendant and demanded immediate payment of Rs. 2,000 as brokerage due on the sale of the mill, which was alleged to have been effected through their client. The solicitor of the defendant promptly replied on the next day. He pointed out that the letter of authority of the 13th

June 1911, was limited to 15 days from the date thereof. He asserted that the plaintiff had failed to secure a purchaser within the prescribed time and that the mill had been sold without any concern with him; and he added that the seller had already paid brokerage on the transaction. This referred to a payment of Rs. 200 by the defendant to the purchaser, who had granted a receipt therefor as paid on account of brokerage. The plaintiff thereupon instituted this suit on the 13th June 1912. The defendant asserted that the sale had taken place without the intervention of the plaintiff as broker and repudiated the claim as entirely unfounded. Mr. Justice Greaves has held on the evidence that the sale was effected through the instrumentality of the plaintiff and has decreed the suit. On the present appeal, the defendant has contended that this finding is not supported by the evidence on the record, and that even if the finding is maintained, it is not sufficient to justify the decree.

It is an elementary principle that where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency whether the purpose of the agency has been accomplished or not; consequently, where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended. It is thus plain that the plaintiff would be entitled to the commission, only if he found a purchaser on or before the 28th June 1911; I do not hold that the plaintiff was bound to complete the transaction within this period; in my view of the contract, the plaintiff would be entitled to the commission, if, within the time prescribed, he produced a person able, ready and willing to enter into the transaction with the defendant on the terms prescribed by the latter, and the plaintiff must within that period notify his

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principal that he had secured such a person. It is also indisputable, I think, that the burden lies upon the plaintiff to establish that he has earned the commission he claims. If these principles are borne in mind, there is no escape from the conclusion that the plaintiff cannot be awarded a decree, merely on the finding that the sale was effected through his instrumentality. If the case were before a Jury, the Court would have to instruct them that to find a verdict for plaintiff, they must find that plaintiff procured a purchaser able and willing to buy on the terms stated in the writing, that he notified defendant of the fact and that this was done within the 15 days prescribed. The vital question, consequently, is, did the plaintiff bring the purchaser to the defendant on or before the 28th June 1911? There is no trace in the correspondence already summarised that he had done so. The first letter of the purchaser to the defendant mentions that he had learnt from the *Exchange Gazette* about the proposed sale of the mill. This, no doubt, is not conclusive proof that he had not met the broker on or before the 25th June; but there is no specific evidence upon which I can act that the two had met before that date. The letter of the 26th June also, taken by itself, does not assist the plaintiff. No doubt, it recites a conversation between the defendant and the purchaser, but it does not show that the plaintiff was present at that interview. I do not overlook that the purchaser asserts that he was introduced to the defendant by the broker, and his version has been accepted as true by Mr. Justice Greaves: but this does not carry matters far enough. The purchaser could not pledge his oath that his first letter was written after the broker had informed him of the proposed sale of the mill. I am not unmindful that the purchaser asserts that he first offered Rs. 35,000 and

that the broker Judah used to come and see him often and got him into the scrape, that is, induced him to pay Rs. 40,000. This statement, even if accepted and taken along with the letter of the 26th June, does not conclusively prove that Judah introduced the purchaser to the defendant on or before the 26th. There can be no dispute that if such introduction did not take place on or before the 26th June, the evidence does not show that it was brought about either on the 27th or 28th June; indeed, the evidence is entirely silent with regard to these two dates.

Mr. Langford James in the course of his able argument for the respondent, properly emphasised the fact that Mr. Justice Greaves, who had the opportunity to see the witnesses, which we have not, has believed the purchaser in preference to the defendant; and he has argued that in a case of this description, where there is a conflict of oral testimony, the Court of Appeal should not reverse the finding of the primary Court. This contention raises a question of considerable importance as to the duty and functions of a Court of Appeal in this country. As was stated by White, J. in *Pratap Chandra Mukerji v. Empress* (1), and by Trevelyan, J. in *Milan Khan v. Sagai Bepari* (2), the sound rule to apply in trying an appeal in a civil case is that the Court must be convinced, before reversing a finding of fact by a lower Court, that the finding is wrong; in other words, the burden lies upon the appellant to satisfy the Court that the finding he assails is not supported by the evidence on the record: *Wise v. Sunduloonnessa Chowdhury* (3), *Tithboonissa Bibre v. Koomar Sham Kishore Roy* (4), *Shetabdees*

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(1) (1892) 11 C. L. R. 25. (3) (1867) 11 Moo. E. L. App. 177, 181

(2) (1895) 1. L. R. 23 Calc. 347. (4) (1871) 15 W. R. 222.

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Biswas v. Molamlee Mundal (1), *Gopee Nath Mookerjee v. Bodduhununt Mal* (2), *Anund Chunder Chuckerbutty v. Rutnessur Dass Sen* (3), *Nobin Chunder Pooshalee v. Kunjo Chunder Chatterjee* (4), *Hoymoobutty Dassee v. Sreekishen Nundee* (5), *Munsnob Bibee v. Ali Meth* (6). When such evidence consists entirely or even principally of the oral testimony of witnesses, the appellant is at a special disadvantage. Reference may, in this connection, be made to the observation of Lord Collins in *Shunmugaroya Mudaliar v. Manikka Mudaliar* (7): "no doubt, it is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have; but that difficulty is greatly aggravated where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of probability against their story, but they are not witnesses of truth." The reasons for this rule of practice are too obvious to require elucidation. But it is worthy of note that Lord Collins refers with approval to the judgment delivered by Lindley M. R. in the Court of Appeal in the case of *Cogħlan v. Cumberland* (8) which sets out the limitations of the rule: "even where the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case and the Court must reconsider the materials before the Judge, with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from

(1) (1875) 25 W. R. 30.

(5) (1870) 14 W. R. 58.

(2) (1875) 25 W. R. 27.

(6) (1872) 17 W. R. 358.

(3) (1875) 25 W. R. 50.

(7) (1909) I. L. R. 32 Mad. 400;

(4) (1876) 25 W. R. 363.

L. R. 36 I. A. 185.

(8) [1898] 1 Ch. 704.

overruling it, if on full consideration, the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge even on a question of fact turning on the credibility of witnesses whom the Court has not seen." In the case in which these observations were made, the Court of Appeal (Lindley M. R., Rigby L. J. and Collins L. J.) allowed the appeal, although the appeal turned on a question of fact. It is obviously impossible to frame a formula to define the impression which must be produced on the minds of the Judges of the Court of Appeal, so that they may not shrink, in the words of Lindley M. R., from overruling the judgment of the trial Court; and the cases in the books employ various expressions which are really of little assistance, such as that the judgment is "clearly wrong," *Khoorshedjee Manikjee v. Mehrwanjee Khoorshedjee* (1), that the decision is "irresistibly erroneous," *Gray v. Turnbull* (2) followed in *Pandurang v. Anant* (3) and in *Bai Gulabai v. Sri Dittgarji* (4).

(1) (1837) 1 Moo. I. A. 431, 442. (3) (1903) 5 Bom. L. R. 956

(2) (1870) L. R. 2 Sc. App. 53. (4) (1907) 9 Bom. L. R. 133

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that a Court of Appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong, *Earl of Bandon v. Becher*(1) followed in *Yemunahai v. Balshot* (2), that the Court will not reverse the decision 'except in cases of extreme and overwhelming pressure' [*The Julia* (3), *The Alice* (4)], that 'a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony,' [*Khoo Sit Hoh v. Lim Thean Tong* (5)], or that the finding 'is so clearly against the weight of the testimony as to amount to a manifest defeat of justice,' [The "Gairloch" (6)]. We may also bear in mind the observation of Lord Chelmsford in *Tayammaul v. Sashachalla Naikar* (7): "the advantage the Judge of the primary Court possesses in forming a correct opinion of the credit due to the witnesses, does not relieve the Court of Appeal from the duty of examining the whole evidence and forming for itself an opinion upon the whole of the case." To the same effect are the observations of Baggallay J. in the *Glannibanta* (8). Indeed, if the conclusion of the trial Court in a case of conflict of oral testimony were held practically unassailable, that Court would in essence be constituted the final Court on questions of fact. But the parties to the cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, though, as James L. J. said in *Bigsby v. Dickinson* (9), "if we are to accept as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours

(1) (1835) 3 Cl. & F. 479, 512.

(5) [1912] A. C. 323.

(2) (1903) 5 Bom. L. R. 584.

(6) [1899] 2 I. R. 1, 18.

(3) (1860) 14 Moo. P. C. 210.

(7) (1865) 10 Moo. I. A. 429, 436.

(4) (1868) 1 L. R. 2 P. C. 245.

(8) (1876) 1 L. R. 1 P. D. 283.

(9) (1876) 1 L. R. 4 Ch. D. 24, 29.

would be very much lightened." The matter is obviously simpler where the conclusion is merely an inference of fact [Lord Blackburn in *Smith v. Chadwick*(1)], or where the evidence on which the decision of the trial Judge is based, has been taken on Commission [Lord Collins in *Imdad Ahmad v. Pateshri Protap Narain Singh* (2)]. But, even in other cases, it is undoubtedly the duty of the Court of Appeal to weigh conflicting evidence and to draw its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. Cases are by no means rare where an Indian Appellate Court has reversed the decision of the primary Court based on conflicting oral testimony and the conclusion of the appellate Court has been ultimately affirmed by the Judicial Committee: *Rashmohini Dasi v. Umesh Chandra* (3), *Gangamoyi Debi v. Troyluckya Nath Chowdhry* (4), *Bulli Kunwar v. Bhagirathi* (5), *Chotey Narain Singh v. Ratan Koer* (6), *Secretary of State v. I. G. S. N. & R. Co.* (7), *Seolal Mahton v. Lokenarayan* (8) (decided by the Judicial Committee on the 23rd January 1912). I am not unmindful that there are other instances where the Judicial Committee has reversed the decision of the local Appellate Court and restored the decree of the trial Judge; but that has been done because their Lordships were satisfied, upon a scrutiny of the entire evidence, that the view of the latter was more consistent therewith than that of the former: *Ramesh Chander Mukerji v. Rajani Kant Mukerji* (9), *Said Ali v. Ibad Ali* (10), *Shama Charn Kundu v. Khetromoni*

- (1) (1891) L. R. 9 A. C. 187, 194. (6) (1894) I. L. R. 22 Calc. 519
 (2) (1910) 14 C. W. N. 842. (7) (1909) I. L. R. 35 Calc 967.
 (3) (1898) I. L. R. 25 Calc. 825 (8) (1912) 16 C. W. N. 466
 (4) (1906) I. L. R. 33 Calc 537. (9) (1893) I. L. R. 21 Calc. 1.
 (5) (1905) 9 C. W. N. 649 (10) (1895) I. L. R. 23 Calc. 1.

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Dasi(1). *Khoo Sit Hoh v. Lim Thean Tong* (2), *Nawab Shah Ara Begum v. Nanhi Begum* (3). We may also bear in mind the fact that although as an ordinary rule the Judicial Committee does not interfere with concurrent judgments of the Courts below, on questions of fact, instances are by no means rare where their Lordships have examined the whole evidence, formed for themselves an opinion on the entire case and reversed the unanimous decision of the two Courts in India on a question of fact: *Rungama v. Atchama* (4), *Haradhun Mookerjia v. Muthoranath Mookerjia* (5), *Mudhoo Soodin Sundial v. Suroop Chunder Sirkar Chowdhry* (6), *Tayammaul v. Sashachalla Naikar* (7), *Guthrie v. Abul Mozoffer* (8), *Baboo Lekraj Roy v. Baboo Mahtabchand*(9), *Hay v. Gordon* (10), *Venkateswara Iyan v. Shekari Varma*(11), *Sheikh Muhammad Kumtaz Ahmad v. Zubaida Jan* (12), *Bishunchand Bachhoot v. Bijoy Singh Dudhuria* (13). It is not necessary for the present purpose to consider whether any general principle is deducible from the expressions used by their Lordships as to the circumstances under which they will depart from the rule ordinarily observed by them, such as 'that the very clearest proof is shown that the decision is erroneous,' that 'the Board is clearly satisfied that there has been miscarriage in the appreciation of evidence,' that it is 'manifestly clear from the probabilities that the Court below was wrong,' that 'the case is very extraordinary,' that 'a strong case must be made out before the

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| (1) (1899) I. L. R. 27 Calc. 521. | (8) (1871) 14 Moo. I. A. 53. |
| (2) [1912] A. C. 323. | (9) (1871) 14 Moo. I. A. 393. |
| (3) (1906) 11 C. W. N. 130. | (10) (1872) L. R. I. A Sup Vol. 106. |
| (4) (1846) 4 Moo. I. A. 1. | (11) (1881) I. L. R. 3-Mad. 384; |
| (5) (1849) 4 Moo. I. A. 414. | L. R. 8 I. A. 143. |
| (6) (1849) 4 Moo. I. A. 431. | (12) (1889) I. L. R. 11 All 460; |
| (7) (1865) 10 Moo. I. A. 429. | L. R. 16 I. A. 205. |
| | (13) (1911) 15 C. W. N. 648. |

Board would recommend reversal,' that 'it must very clearly appear that the conclusion is very plainly erroneous,' that 'there has been some miscarriage in respect of a presumption to which too much weight was given,' that 'very definite and explicit grounds must be assigned for interference,' that 'there is so strong a preponderance of testimony that the Board can confidently pronounce the decision to be wrong,' and other expressions of like import. But it is obvious that if reversal of concurrent findings of fact is permissible, the Court of first appeal should not be deemed fettered to a larger extent.

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In the present case, as I have already stated, the finding that the sale was effected through the instrumentality of the plaintiff does not justify a decree in his favour. The purchaser does not make an explicit statement that the plaintiff introduced him to the defendant on or before the 28th June 1911; but even if this much be deemed to be implied in his statements, I cannot accept his testimony. The correspondence does not shew any trace of the presence of Judah in the negotiations; one would have expected some mention of his name in the first or the second letter. It is also remarkable that no written communication appears to have passed between the plaintiff and the defendant, although the plaintiff had taken the precaution to accept the agency by a written instrument. There is further the unexplained fact that the purchaser received Rs. 200 as 'brokerage'; he cannot explain why the sum was described by this obviously inappropriate term; it is extremely improbable that the defendant would have made a present of this sum to the purchaser, if he had really to pay Rs. 2,000 to the plaintiff as brokerage. There is the further significant fact that the claim for brokerage was not put forward till the 26th January 1912,

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though, if the plaintiff is to be believed, he had earned it before the 26th June 1911, and the sale had been actually completed on the 27th September, 1911. Finally, the case for the plaintiff is certainly not improved by the letter alleged to have been written on the 15th November 1911, which plainly bears the appearance of an attempt to create evidence for future use. After the most careful and anxious consideration of the entire evidence on the record and the circumstances of the case, I have arrived at the conclusion that the plaintiff has failed to establish that he has earned the commission claimed in terms of the contract and that the decree in his favour cannot be supported. In my opinion, the appeal should be allowed and the suit dismissed with costs throughout.

SANDERSON C. J. The result is that, in view of opinion expressed by the majority of the Court, this appeal will be allowed, the judgment of the Court of first instance set aside, and the plaintiff's suit dismissed with costs, both of the Court of first instance and of this appeal.

Appeal allowed.

Attorney for the appellant: *S. C. Mookerjee.*

Attorney for the respondent: *C. C. Bose.*

J. C.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J., Woolroffe and Mookerjee JJ.

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Dec 21.

Appeal—Order of Judge sitting on Original Side rejecting an application for an order to set aside dismissal of suit, whether appealable—Jurisdiction—Letters Patent, 1865, ss. 15, 44—“Judgment”—Civil Procedure Code (Act V of 1908) ss. 104, 117; O. IX, rr. 8, 9. O. XLIII, r. 1 (c); O. XLIX, r. 5—Costs.

An appeal lies to the High Court in its Appellate Jurisdiction from an order made under Order IX, rule 9 of the Civil Procedure Code, by a single Judge sitting on the Original Side of the High Court, rejecting an application for an order to set aside the dismissal of a suit.

Hurrish Chunder Choudhury v. Kali Sunder Das Debti (1), *Gobinda Lal Das v. Shub Das Chatterjee* (2), *Mansab Ali v. Nshal Chand* (3), *Brij Coomaree v. Hamrick Dass* (4), *Toolsee Money Dassree v. Suderi Dasree* (5), *The Justices of the Peace for Calcutta v. The Oriental Gas Co* (6), *Sonabai v. Ahmedbhais Hahibhai* (7), *Haljee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (8) referred to.

Gobinda Lal v. Shub Das (2) dissentient from by Mookerjee J.

The order of dismissal set aside and the suit restored by the Court of Appeal, subject to an order for costs.

Southampton Isle of Wight Portsmouth Improved Steamboat Co. v. Rail. Ins. (9), *Michell v. Wilson* (10), *Birch v. Williams* (11), *Hall v. Lewis* (12), *Muruga Chetty v. Rajasami* (13), *The Oriental Finance Corporation v. The*

* Appeal from Original Civil, No. 43 of 1915, in suit No. 49 of 1913.

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| (1) (1882) I. L. R. 9 Calc. 482 | (7) (1872) 9 Bom. H. C. 394. |
| (2) (1906) I. L. R. 33 Calc. 1323 | (8) (1874) 13 B. L. R. 91. |
| (3) (1893) I. L. R. 15 All. 559 | (9) (1865) 34 L. J. Ch. 267. |
| (4) (1901) 5 C. W. N. 781. | (10) (1877) 25 W. R. 351. |
| (5) (1899) I. L. R. 26 Calc. 361. | (11) (1876) 24 W. R. (Eng.) 700. |
| (6) (1872) 8 B. L. R. 433 | (12) (1832) 2 Keen 318. |
| (13) (1912) 22 Mad. L. J. 284 | |

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Mercantile Credit and Finance Corporation (1), and Burgaon v. Taylor (2)
referred to by Mookerjee J.

APPEAL by the plaintiff, Sreemutty Mathura Sundari Dasi, from the order of Imam J.

This appeal was from an order rejecting an application for an order to set aside the dismissal of a suit, and refusing to restore the suit.

The suit was instituted on the 14th January 1913 by the plaintiff the wife of one Kissori Mohan Shah for an account of certain moneys alleged to be due to her and for consequential relief.

The plaintiff alleged that several years previously three brothers, Pitambar Shah, Nilambar Shah and Hookum Chand Shah, who were members of a joint Hindu family and governed by the Bengal School of Hindu Law, commenced carrying on business in partnership as bankers and merchants under the name and style of Pitambar, Nilambar, Hookum Chand Shah. At the time of suit the business was being carried on in the name of the parent firm at Backergunge and in other names at various places including Calcutta.

Pitambar died leaving a son Krishna Mangal Shah—the latter died in 1883 leaving a widow Annando Moyee Dasi and an adopted son Kissori Mohan Shah, the plaintiff's husband, him surviving and leaving a will whereby he appointed his widow sole executrix and bequeathed all his property to Kissori Mohan Shah. Krishna Mangal Shah had kept a large sum of money in deposit with the firm of Pitambar Nilambar Shah a branch at Belliaghatta in the name of Ananda Moyee, and in 1896 this sum had amounted to Rs. 1,64,000. In that year Kissori Mohan Shah made an absolute gift to the plaintiff of the sum of Rs. 50,000 out of this sum. The plaintiff withdrew

the sum of Rs. 50,000 and deposited it with the firm of Prem Chand Roy at Hatkhola in Calcutta, in the name of Krishna Mangal Shah but for the plaintiff's benefit. On the 13th August 1896, the sum was again transferred to the firm of Pitambar Nilambar Shah and credited to the plaintiff, the firm promising to pay interest at nine per cent. On the 2nd January 1913, the plaintiff demanded the return from the firm of Pitambar Nilambar Shah of the sum of Rs. 50,000 together with the interest accrued less the sum of Rs. 8,000 which, she alleged, she had previously realised. On failing to receive payment the present suit was instituted, the plaintiff claiming that a sum of over a lakh of rupees was still due to her for principal and interest.

The suit was brought against Kissory Mohan Shah, Ananda Moyee and several other defendants the representatives of Nilambar Shah and Hookum Chand Shah who had died previously.

Two applications were made by the defendants on the 12th May 1913 and the 20th June 1914 to have the plaint taken off the file: both applications were rejected, on the former occasion an order being made that the plaintiff should furnish security for costs.

Several applications were made by the plaintiff to compel the defendants to file their written statements and affidavits of documents.

Several written statements were filed by the defendants other than Kissory Mohan Shah and Ananda Moyee in December 1913 and in January, March and May 1914, respectively, in which the pleas were taken that this Court had no jurisdiction to entertain the action, and that the suit was barred by limitation and the alleged gift of Rs. 50,000 and the deposit of the same and the repayment thereout of Rs. 8,000 were put in issue.

Issues were settled on the 2nd and 12th June 1914

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before Chandhuri J., and the inspection of documents was completed in January 1915. On the 15th January the plaintiff applied for the adjournment of the case for two months: the application was refused.

On the 2nd February 1915, the case was specially fixed for hearing before Imam J. on the 4th February 1915, subject to a part-heard case.

The suit was called on on the 5th February, when counsel for the plaintiff applied for a fortnight's adjournment on the ground of the plaintiff's illness, it being represented that the plaintiff "was suffering from intestinal colic together with palpitation of the heart and was quite unfit to move about for at least a week," and offered to pay the costs of the adjournment. The application was resisted by the defendants. The Court intimated to counsel for the plaintiff that he should open the case and give such evidence as he had available and that an adjournment would then be allowed to call the plaintiff. Counsel for the plaintiff desired to retire from the case, if the adjournment was not granted. The application for an adjournment was refused; and the suit was then dismissed with costs.

On the 25th March 1915, an application was made by the plaintiff for the restoration of the case. The application was dismissed by Imam J., his Lordship observing as follows:—

"This is an application by the plaintiff Mathura Sundari Dassi for an order under O. 9 R. 9 of the Code of Civil Procedure asking the dismissal of her suit be set aside. The hearing of the suit had been peremptorily fixed for the 4th of February last subject to any part heard case. As I was hearing a case the trial of which had commenced before the 4th of February, I could not take up Mathura Sundari's suit on that date. On the 5th of February when the case was called on for hearing Mr. C. R. Das, counsel for the plaintiff, applied for adjournment on the ground of her illness. I refused the adjournment and then Mr. Das with his junior colleagues retired from the case. Thereupon I dismissed the suit with costs. I do not desire to comment on the attitude taken up on behalf of the plaintiff when I intimated to the learned counsel that I would not

adjourn the case. The notes of Mr. M. N. Bose, one of the counsel for defence, have been read out to me and they are substantially faithful in relating what happened on the occasion. I gave to Mr. Das every reasonable facility in conducting his case but nothing short of adjournment was acceptable to him. I think it would be wrong to allow this application. The application therefore is dismissed with costs. Two sets of costs are allowed one for the infant and the other for the other defendants. Let a copy of Mr. Bose's note be kept with this order."

From this order the plaintiff appealed

Mr. S. R. Das (with him *Mr. B. C. Mitter* and *Mr. Goswami*), for the appellant.

Mr. Jackson (with him *Mr. M. N. Basu*), *Mr. Sircar* (with him *Mr. W. Bose*), *Mr. H. D. Bose* (with him *Mr. Langford James* and *Mr. Bhar*), for the various respondents.

Mr. Jackson took the preliminary objection that the appeal did not lie. The right of appeal is a creature of statute and it is incumbent on the appellant to shew that there is a statutory right of appeal: *Rangoon Botatowing Co. v. The Collector, Rangoon* (1). An appeal lies from the Original Side of the High Court to the Court of Appeal only by virtue of section 15 of the Letters Patent: for this purpose, it is requisite there should be a "judgment" which is appealed against. It is submitted that an order under Order IX, rule 9 of the Code refusing to set aside an order of dismissal is not a "judgment" within the meaning of section 15 of the Letters Patent. The right or liability of the parties was determined by the dismissal of the suit under rule 8, and the position of the parties was not affected by the dismissal of the subsequent application under rule 9. The order of dismissal under rule 8 was by operation of law—rule 8 is mandatory. That the order of Imam J. refusing to set aside the dismissal is not a judgment within the meaning of section 15 of the Letters

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Patent is clear from the following authorities: *The Justices of the Peace for Calcutta v. The Oriental Gas Co.*(1), followed in *Mussamat Brij Coomaree v. Ramrick Dass* (2), *Aubhoy Churn Mohunt v. Shamun Lochun Mohunt* (3), *Gobinda Lal Das v. Shiba Das Chatterjee* (4), *Kishen Pershad Panday v. Tiluckdhari Lall* (5), *Srimantu Raja Yarlagadda Durga Prasad Nayadu v. Srimantu Rajar Yarlagadda Mallikargima Prasada Nayadu* (6), *Sabhapathi Chetti v. Narayanasami Chetti* (7).

The Civil Procedure Code and the rules thereunder cannot extend the jurisdiction of the High Court as determined by the Letters Patent. The provisions and the rules of the Code relating to appeals apply only to appeals from subordinate Courts to the High Court and not to appeals from a Judge of the High Court sitting on the original side to the appellate jurisdiction of the High Court: *Hurrish Chunder Chowdhry v. Kaliunderi Debi* (8), *Mansab Ali v. Nihal Chand* (9) which were decisions on the analogous section 588 of the old Code. It follows that Order XLIII r. 1 (c) cannot be deemed to give any right of appeal in the present matter.

Mr. S. R. Das. None of the authorities cited on behalf of the respondent cover the exact point in this appeal. Although an order under Order IX, r. 8 may be by operation of law, an application lies under rule 9 to set aside such order of dismissal, and on such an application the Court has to exercise its discretion; refusal to set aside the dismissal debars the plaintiff for all time from prosecuting his claim. Such an order

(1) (1872) 8 B. L. R. 433. (5) (1890) I. L. R. 18 Calc. 182.

(2) (1901) 5 C. W. N. 781. (6) (1901) I. L. R. 24 Mad. 358.

(3) (1889) I. L. R. 16 Calc. 788. (7) (1901) I. L. R. 25 Mad. 555.

(4) (1906) I. L. R. 33 Calc. 1323. (8) (1882) I. L. R. 9 Calc. 482.

(9) (1893) I. L. R. 15 All. 359

clearly falls within the ruling in *The Justices of the Peace for Calcutta v. The Oriental Gas Co.* (1), and is a "judgment" within the meaning of section 15 of the Letters Patent and is appealable by virtue thereof. Apart from this right of appeal, there is a further express right of appeal under the provisions and rules of the Civil Procedure Code. Section 44 of the Letters Patent preserves the powers of the Indian Legislature and ordains that "all the provisions of the Letters Patent are subject to the legislative Powers of the Governor General in Council . . . and may be in all respects amended and altered thereby." Now by section 117 of the Code, the provisions and rules of the Code with certain exceptions which have no application to the present matter, are expressly made applicable to High Courts. Hence Order XLIII applies and sub-clause (c) of rule 1 gives the right of appeal from the order in point. Order XLIX, rule 3 sets out the rules under the Code which shall not apply to High Courts and Order XLIII is not mentioned therein. *Hurrish Chunder Chowdhry v. Kalisunderi Debi* (2) decided that section 588 of the old Code did not restrict the right of appeal under section 15 of the Letters Patent. Whatever the effect of s. 588 of the old Code may have been as interpreted by the decisions, the Law has been altered by section 104 of the present Code : s. 104 gives a further right of appeal in cases where s. 15 of the Letters Patent may not be applicable. The intention of the Legislature was clearly to override the decisions in *Hurrish Chunder Chowdhry v. Kalisunderi Debi* (2), and *Mansab Ali v. Nihal Chand* (3), so far as they tend to indicate that the old Code was not applicable to appeals from the Original Side of the High Court to the Court of Appeal.

(1) (1872) 8 P. L. R. 433

(2) (1872) 1 L. R. 9 Cal. 472

(3) (1873) 1 L. R. 15 All 359

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(1) (1872) 8 B. L. R. 433

(2) (1872) 1 L. R. 9 Cal. 472

(3) (1873) 1 L. R. 15 All 352.

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[The Court disallowed the objection and intimated that reasons would be given later.

The appeal was then heard on its merits. The arguments of counsel on the merits are unnecessary for the purposes of this report.]

Cur. adv. vult.

SANDERSON C.J. With regard to the preliminary objection which was raised by Mr. Jackson, when that point was taken, the case was argued upon the assumption that the suit had been dismissed under Order IX, rule 8 which deals with default of appearance, and, therefore, I propose, whatever may have been the real position to deal with the argument which was presented to us by the learned Counsel upon the basis that the order by Mr. Justice Imam dismissing the suit was made under Order IX, rule 8. That order was made on the 5th of February, 1915. Then an application was made on the 25th of March of this year to set aside that order of dismissal. That was heard by the learned Judge and was refused, and the plaintiff appealed from that order of refusal to restore the case and set aside the dismissal, and a preliminary point has been taken by the learned Counsel for the defendant that no appeal lies from such an order.

It was argued by the learned counsel for the defendant, Mr. Jackson, first, that the order in question was not a 'judgment' within the meaning of clause 15 of the Letters Patent; and, secondly, that if it is not within clause 15 of the Letters Patent, the Civil Procedure Code has no application to an appeal from a Judge of the High Court to other Judges of that Comt.

As to the first point, namely, whether the order in question was a 'judgment' within the meaning of

clause 15, personally I should not have had much doubt or hesitation in holding that the order was a 'judgment' within the meaning of that clause, if it had not been for some cases which were cited to us. It is quite true that the learned Judge had no discretion upon the question of the dismissal of the suit under Order IX, rule 8. In fact the rule expressly says, "Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed" The learned Judge has no option and under such circumstances he must dismiss the suit. But when the application to set aside that dismissal is made, in my opinion, the Judge has a discretion, and he must exercise his judgment on the materials before him. The question on which he has then to exercise his judgment and his judicial discretion may, as in this case be a matter of great importance. It is no less than whether the plaintiff under the circumstances of the case shall be allowed to prosecute his suit or for all time be debarred from trying to enforce his claim. Clause 15 obviously refers to 'judgments,' which in common parlance may be called *orders*. In my opinion, the decision so arrived at on such a question as above stated would be a 'judgment' within the meaning of the word 'judgment' in the Letters Patent. The judgments, however, in some of the cases which Mr. Jackson has cited to us throw some doubt upon the correctness of the above view. I do not refer to them all, though I have considered them; the most important are *Hurrish Chunder Chowdhury v. Kali Sunderi Debi* (1) and *Gobinda Lal Das v. Shiba Das Chatterjee* (2). I only pause to remark that the exact point which arises in this case has not been decided, as far as I know, in any reported

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case, and I am informed that many such appeals, as this, have been heard in the Court of Appeal here, but it is said that in one unreported case the decision of this Court was that an appeal would not lie. The decision in the present case on the application of the plaintiff does in my opinion decide a question which affects the rights of the plaintiff. He alleges that he should be allowed to prosecute his claim. A refusal of the application debars him for all time. If he had put in a plaint which was ill-framed and that had been struck out by the learned Judge, according to the decision in one of the cases, he would have a right of appeal within the very terms of the judgment in that case—that was an illustration in *Hurrish Chunder Chowdhry v. Kalisunderi Debi* (1)—yet when an order is made which debars his suit for all time, according to the argument of Mr. Jackson, he is not to have a right of appeal. I should be very loth to hold that this order is not a 'judgment' within the meaning of clause 15 of the Letters Patent, but it is not necessary in my judgment to give a definite opinion upon it, because I think, on the second point, the Code does give a right of appeal. By clause 44 of the Letters Patent it is provided as follows:—"And we do further ordain and declare, that all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations . . ." By the terms of section 117, the Code is made applicable to the High Court, and Order XLIII, rule 1 gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the defendant's case that

Order IX, rule 8 applies. That order is in effect a part of the Civil Procedure Code. It seems to me strange that the plaintiff should be subjected to Order IX, rule 8 and be liable to have his suit dismissed for want of appearance, yet when he has had his suit dismissed under one of the rules of the Code and wants to call in aid another of the rules which,—when his application for re-instatement has been refused, gives him a right of appeal against that refusal, he is met with the argument that he cannot call in aid that rule because there is no appeal from the learned Judge of the High Court under the Civil Procedure Code. I think this is not a true view or a reasonable construction to put upon the Code and the rules made under it. In my judgment, the Code and the rules do apply and the plaintiff has a right of appeal.

[On the merits his Lordship observed:—] This case has given me a considerable amount of anxiety, and I think the safest thing for me to do, in giving judgment, having regard to the course which we intend to adopt is to say as little as possible about the case itself, on the merits or demerits of the case, because if I do say anything, it may be taken to prejudice either the one side or the other. I have come to the conclusion that the safest course for this Court will be to order this suit to be re-entered—I am not grounding my judgment upon what happened before January or February this year, but I take a few facts, namely, that this case was fixed to be tried by Mr. Justice Imam on the 4th of February, that apparently—according to the evidence which was before the Court—on the 3rd, the plaintiff, the lady, who had been suffering to some extent from colic for some time, was taken worse; that on the 4th that matter was mentioned to the learned Judge, and that an application would be made for adjournment. When the case was adjourned

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on the 5th, what happened is shown by the entry in the learned Judge's note and is as follows:—"Mr. Das withdraws from the case, that he has only instructions to apply for adjournment and he does not appear any more in the case." I do not know exactly what the position was as regards Mr. Das; unfortunately, he is not here to-day; he is out of Calcutta as I understand—but having regard to the admission which has been made by the learned counsel for the appellant, Mr. S. R. Das, to the effect that the learned counsel who appeared in the Court below took a wrong course, it seems to me that we must conclude that he ought to have gone on with the case, when the learned Judge gave him an opportunity of calling his other witnesses, and if necessary asking for an adjournment in order that the plaintiff might be examined at a subsequent time. It is, therefore, admitted that the learned counsel made a mistake, in the course which he and his junior adopted. The only question is whether the plaintiff in consequence of that mistake is to be debarred for all time from prosecuting her suit. It is a suit for a large sum of money: there are serious issues in it, and I think that if I had been in the position of Mr. Justice Imam I would have allowed the case to be re-entered upon terms: and, inasmuch as there is an appeal (we have decided already that there is an appeal in a matter of this kind), I have to apply my mind and try to ascertain what I should have done, had I been in the position of Mr. Justice Imam. In my judgment, this case should be re-entered and the conditions of reinstatement are these:—The plaintiff must pay the taxed costs of the defendants, viz., such costs as were thrown away by the case not proceeding on the day when it should have, and she must also pay the taxed costs of the defendants upon the application before Mr.

Justice Imam for restoration, and also the taxed costs of the respondents in this appeal except for the first day which I think was occupied by the argument on the preliminary objection that there was no appeal, upon which question we have decided against the respondent. The plaintiff must pay such costs as I have intimated as a condition precedent to the case being re-entered. And, upon the point mentioned by Mr. Das, although at one stage of the proceedings there were only two sets of costs, still it seems to me that the defendants were entitled to appear here by separate counsel, and as regards this appeal there will be separate sets of costs as regards each defendant who appeared.

Further, inasmuch as the taxation of costs may take some time we think that the plaintiff ought to bring into Court within three weeks from this date the sum of Rupees 2,000 and it is to be clearly understood that the case will not be re-entered until the costs have been taxed and paid: they must be paid within one month from the certificate of costs. The appellant will have the costs of the first day of the appeal which was taken up in the preliminary point, and these costs will be set-off, on taxation, against the costs which she will have to pay.

We direct that the taxation be expedited.

If the sum of Rs. 2,000 be not paid into Court and if the taxed costs payable by the appellant as aforesaid, after the taxation and the set-off, be not paid by her within the time fixed, the case will not be restored, and in that event the appellant will be liable to pay the taxed costs of this appeal after the set-off which has been allowed.

WOODNOFFE J. I need not in this case consider the question whether section 101 of the Civil Procedure

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Code touches the right of appeal given by the Letters Patent; for, if the order appealed from is a judgment within the meaning of the Letters Patent the question does not arise. It has doubtless been held that an order dismissing an appeal for default is not a judgment: *Mansab Ali v. Nihal Chand*(1). But we are not concerned here with an order under Order IX, rule 8 only but with an application for restoration under Order IX, rule 9. Whether or not as a question of jurisdiction an appeal lies under clause 15 of the Letters Patent in a case in which an appeal is allowed under the Code I think it may be said that there are *prima facie* grounds for holding that an appeal should be held to lie under the Letters Patent where it is allowed under the Code; for, the fact that the Legislature has in the Code allowed an appeal in a particular case affords to my mind *prima facie* ground for supposing that that case is of a class which this Court considers appealable under its Letters Patent. This Court has further held that we should not adopt a narrow construction: *Brij Coomaree v. Ramnick Dass*(2). Looking at the nature of the order appealed from, I think I should hold that it is appealable as a "judgment" under the Letters Patent. I do not consider *Gobind Lal Das v. Shiba Das Chatterjee* (3), which was on another section, is any bar to my so holding.

On the facts of this appeal I have myself doubts whether we should allow it. But as my learned colleagues are prepared to give an indulgence to the plaintiff, and that indulgence is to be on the term that all costs should be paid as a condition precedent, I do not dissent from the order proposed.

(1) (1893) I. L. R. 15 All. 359. (2) (1901) 5 C. W. N. 781.

(3) (1906) I. L. R. 33 Calc. 1323.

MOOKERJEE J. This appeal is directed against an order under rule 9 of Order IX of the Civil Procedure Code, whereby Mr. Justice Imam has refused to set aside an order of dismissal of a suit made by him under rule 8.

As a preliminary objection has been taken to the competency of the appeal, it is incumbent upon the appellant to establish that she has a right of appeal [*Minakshi v. Subramanya* (1)]; for as Lord Bramwell said in *Sandback Charity Trustees v. North Staffordshire Ry. Co.* (2), an appeal does not exist in the nature of things; a right of appeal from any tribunal must be given by express enactment—words quoted with approval by Lord Macnaghten in *Rangoon Botatoung Co. v. The Collector, Rangoon* (3). She relies upon Order XLIII, rule 1, clause (c) of the Civil Procedure Code as also upon clause 15 of the Letters Patent.

Order XLIII, rule 1 clause (c) provides that “an appeal shall lie from an order under Order IX, rule 9 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit.” The question, consequently, arises, whether Order XLIII, rule 1, clause (c) is applicable to an order under Order IX, rule 9, made by a Judge on the Original Side of this Court.

On behalf of the appellant reliance has been placed upon section 117 of the Code, which lays down that “save as provided in this part or in Part X or in Rules, the provisions of this Code shall apply to High Courts established under the Indian High Courts Act, 1861.” The only provision in Part IX which may have any possible bearing, is that contained in section 120, which obviously does not touch the present question. The provision in Part X, which deals with this matter, is

(1) (1887) I. L. R. 11 Mal. 26. (2) (1877) I. L. R. 3 Q. B. D. 1.
(3) (1912) I. L. R. 43 Cal. 21.

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contained in section 129; this also does not militate against the contention of the appellant. The term "Rule," which finds a place in section 117, is defined in clause 18 of section 2 of the Code to mean "a rule contained in the first schedule or made under section 122 or section 125." Our attention has not been drawn to any such rule which makes Order XLIII, rule 1, clause (c) inapplicable. On the other hand, Order XLIX, rule 3, which excludes the operation of other rules, lends support to the contention of the appellant that Order XLIII, rule 1, clause (c) is applicable to the present suit.

But it has been argued, on behalf of the respondents, on the authority of the decision of the Judicial Committee in *Hurrish Chunder Chobahry v. Kali Sunderi Debi* (1), that the Civil Procedure Code, in so far as it provides for appeals, does not apply to an appeal preferred from a decision of one Judge of a High Court to the Full Court. The true effect of the decision of the Judicial Committee was considered by this Court in *Toolsee Money Dassee v. Sudevi Dassee* (2); but it is not necessary for my present purpose to determine its bearing in all its implications, because in my opinion, the law has been substantially altered since that decision was pronounced. Section 104 of the Code of 1908 is materially different from section 588 of the Code of 1882. It provides that "an appeal shall lie from the orders mentioned in the first clause of that section and, save as otherwise expressly provided in the body of the Code or by any law for the time being in force, from no other orders." The effect of section 104 is thus, not to take away a right of appeal given by clause 15 of the Letters Patent, but to create a right of appeal in cases even where clause 15 of the Letters Patent is not applicable. I may here observe

(1) (1882) I. L. R. 9 Calc. 482.

(2) (1899) I. L. R. 26 Calc. 361.

parenthetically that in the case of *Toolsee Money Dassee v. Sudevi Dassee* (1), Prinsep J. felt pressed by the argument that if an appeal was deemed to have been allowed by the Code of Civil Procedure, there was no provision for the constitution of a Court to which such an appeal might be preferred. Section 106 of the Code, however, lays down that "where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made." Consequently, where a right of appeal has been so given, it would be the duty of this Court to constitute a Court of Appeal under section 13 of the Indian High Courts Act. I hold, accordingly, that this appeal is competent under clause (c), rule 1, Order XLIII of the Civil Procedure Code.

I am further of opinion that the appeal is competent also under clause 15 of the Letters Patent. That clause allows an appeal from a "judgment", and, the controversy has consequently centred round this expression. Reference has been made to the now classical definition [*Brijgoomree v. Ramnick Dass* (2)] first formulated by Couch C. J. in the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Co.* (3). "Judgment" in clause 15 means a decision "which affects the merits of the question between the parties by determining some right or liability; it may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined." Substantially the same view was adopted by Sargent C. J. in

(1) (1829) 1 L. R. 26 Calc. 361 (2) (1891) 5 C. W. N. 781.
 (3) (1872) 6 B. L. R. 431

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Sonabai v. Ahmedbhai Habibhai (1) and was later on applied by Couch C. J. himself in *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (2), where he held that an appeal lies from an order refusing to set aside an order granting leave to a plaintiff to sue under clause 12 of the Letters Patent. Reference may also be made to the decision of this Court in *In the matter of the petition of Kally Sundery Dabia* (3), subsequently affirmed by the Judicial Committee [*Hurrish Chunder Chowdhry v. Kalisunderi Debi* (4)], where an appeal was entertained against an order refusing to transmit for execution an order of His Majesty in Council. It must be remembered in connection with these decisions that they do not profess to give an exhaustive definition of the term "judgment", and other definitions of a very comprehensive scope have, from time to time, been attempted, for instance by Scott C. J. in *Ahmed Bin Sheikh v. Ayeshabai* (5), by Bittleston J. in *De Souza v. Coles* (6), and by White C. J. in *Taljarim Row v. Alagappa Chettiar* (7). In the opinion of Bittleston J. the term 'judgment,' includes "any decision or determination affecting the rights or the interest of any suitor or applicant", and that it is "impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." In the opinion of White C. J., this is too wide, and the test is "not what is the form of the adjudication, but what is its effect on the suit or proceeding in which it is made; if its effect, whatever its form may be, and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court.

(1) (1872) 9 Bom. H. C. 398.

(2) (1874) 13 B. L. R. 91.

(3) (1881) I. L. R. 6 Calc. 594.

` (7) (1910) I. L. R. 35 Mad. 1.

(4) (1882) I. L. R. 9 Calc. 482.

(5) (1909) 11 Bom. L. R. 248.

(6) (1868) 3 Mad. H. C. 384.

before which the suit or proceeding is pending, is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment." But, whether we adopt the wider or the narrower view of the scope of the term "judgment", although I may add that I am not disposed as Maclean C. J. was not disposed [*Brij Coomaree v. Ramrick Dass* (1)] to favour an attempt to place a narrow construction on the term "judgment", it is plain that the order in this case is a "judgment," within the definition formulated by Couch C. J. in *Justices of the Peace for Calcutta v. The Oriental Gas Co.* (2). The order under appeal does affect the merits of the question in controversy between the parties by the determination of a right or liability. No doubt, it has been argued that the right or liability of the parties was determined by the dismissal of the suit and the position was not affected by the subsequent dismissal of the application to revive the suit. But this clearly overlooks the fundamental point that the primary order of dismissal of the suit was liable to be revoked, as it was subject to a possible order of restoration under rule 9. The effect of the subsequent order is accordingly to give a character of finality to the primary order of dismissal, by a determination that the applicant had failed to establish grounds in support of his alleged right to an order under rule 9 of Order IX. Such determination is, in my opinion, a "judgment" within the meaning of clause 15 of the Letters Patent.

I am not unmindful that the contrary view may receive an apparent support from some *dicta* in reported decisions, for instance, *Rugho Bibee v. Noor Jehan Begum* (3) and *Gobinda Lal Das v. Shiba Das Chatterjee* (4). As regards the former case, which ruled

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(1) (1901) 5 C. W. N. 781
(2) (1872) 8 B. L. R. 433.

(3) (1869) 12 W. R. 452.
(4) (1897) 1 L. R. 33 Cal. 1322.

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that an order dismissing an application for review is not a judgment, it is sufficient for our present purpose to observe that judicial opinion on this matter has not been uniform: *Ramhari Sahu v. Madan Mohon Mitter*(1), *Aubhoy Churn Mohunt v. Shamont Lochun Mohunt* (2), *Mulji Virji v. Bangabashi Saha* (3). As regards the latter case [*Gobind Lal v. Shiva Das*(4)], stress is laid upon the following passage in the judgment of Ghose C.J.: "an order which terminates a proceeding is a judgment within the meaning of clause 15, but it must be a proceeding in the course of a suit or in relation thereto, and in which some question or other as to the right or liability of any party is raised, and not a proceeding in respect of a matter which had already come to termination by operation of law or otherwise." I feel bound to record my respectful dissent from this exposition of the law, for the qualification formulated plainly carries us beyond the definition of the term "judgment" as given by Conch C. J., and if the question arises in another case precisely on all fours with the decision mentioned, and if it comes before me, I shall not hesitate to refer the matter for consideration to a Full Bench. It is not necessary, however, to adopt that course on the present occasion, as admittedly there is no decision which precisely covers the case before us; and the class of cases which rule that an order refusing [*Tara Chand Biswas v. Radha Jeebun Mustofee* (5), *Manly v. Patterson* (6), *Lutf Ali Khan v. Asgur Reza* (7), *Kishen Pershad Panday v. Tiluckdhari Lall* (8)] or granting [*Amirunnissa v. Behary Lall* (9), *Mowla Euksh v. Kishen Pertab Sahi* (10)] an

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| (1) (1895) I. L. R. 23 Calc. 339. | (6) (1881) I. L. R. 7 Calc. 339. |
| (2) (1889) I. L. R. 16 Calc. 788 | (7) (1890) I. L. R. 17 Calc. 455. |
| (3) (1905) 9 C. W. N. 592. | (8) (1890) I. L. R. 18 Calc. 182. |
| (4) (1906) I. L. R. 33 Calc. 1823. | (9) (1876) 25 W. R. 529. |
| (5) (1875) 24 W. R. 148. | (10) (1875) I. L. R. 1 Calc. 102. |

application for leave to appeal to His Majesty in Council, or for stay of execution [*Mohabir Prosad Singh v. Adhikari Kunwar*(1), *Chitto Sheikh v. Kazee Muzzen Hossein* (2)], is not a 'judgment', plainly stands on a different footing.

As regards the merits, I am clearly of opinion that the application under rule 9 of Order IX should have been granted. We have not had the advantage of hearing from Mr. C. R. Das his version of what took place in Court when the suit was dismissed for default. But, on the materials before me, I see no escape from the conclusion that there was a grave error of judgment on his part and that he should have proceeded with the suit. The question then reduces to this—should his client be penalized for his error of judgment, if so, to what extent. The client will be penalized by the order which the Court of appeal is about to make in so far as the payment of costs is concerned; but I am not prepared to hold that the client should be penalized to the extent of dismissal of her claim without investigation. Judicial decisions of high authority favour the view that even where suits have been dismissed for the mistake or laches of the legal advisers of parties, the Court will not hesitate, if proper grounds are made out, to restore the suit upon payment of costs [*Southampton Isle of Wight and Portsmouth Improved Steam Boat Co. v. Rawlins* (3), *Michell v. Wilson* (4), *Burch v. Williams* (5), *Hale v. Lewis* (6), *Muruga Chetty v. Rajasami* (7)]; but reference need be made specially to one case in this country, *The Oriental Finance Corporation v. The Mercantile Credit and Finance*

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| (1) (1891) 1 L. & R. 21 (Cal.) 473 | (4) (1877) 25 W. R. (L.Rg.) 381 |
| (2) 2 Hyde 212. | (5) (1876) 24 W. R. 261. |
| (3) (1865) 34 L. J. Ch. 297 | (6) (1836) 2 Keen 514 |
| (7) (1912) 22 Mat. L. J. 244 | |

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Corporation (1), and to another in England, *Burgoine v. Taylor* (2). In my opinion, this appeal should be allowed and the suit restored on the conditions mentioned in the judgment of the Chief Justice.

Appeal allowed.

Attorney for the appellant: *N. C. Bose.*

Attorneys for the respondents: *K. K. De, B. P. Chunder, B. L. Mookerjee, S. C. Ghosh and P. N. Banerjee.*

J. C.

(1) (1866) 2 Bom. H. C. 282.

(2) (1878) L. R. 9 Ch. D. 1.

APPELLATE CIVIL.

Before Richardson and Imam JJ.

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Landlord and Tenant—Non-transferable occupancy holding—Occupancy holder transferring part of his holding without the knowledge or consent of the landlord—Transfer, validity of—Non-payment of rent by tenant—Disclaimer—Suit by landlord for his possession of the transferred portion

The holder of a non-transferable occupancy holding has no power to create by transfer a title good against his landlord.

Where a tenant transferred by a deed of sale a portion of his non-transferable occupancy holding without his landlords' knowledge or consent and subsequently refused to pay the rent of the transferred portion to the landlords, on the ground that it was sold and relinquished in favour of the purchaser, paying rent only for the portion of the holding which remained

*Appeal from Appellate Decree, No. 3882 of 1913, against the decree of Sarot Chandra Sen, Subordinate Judge of Dacca, dated Aug. 12, 1913, reversing the decree of Amulya Gopal Roy, Munsif of Naraiungunge, dated April 25, 1912.

in his possession, and where such apportionment of the rent was accepted by the landlords :—

Held, that such an act on the part of the tenant amounted to a disclaimer to all right, title and interest to the transferred part, and that the part transferred was at the disposal of the landlords, unless any third person could make out a good title to possession as against them

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SECOND APPEAL by Kunja Kishore Pal Chowdhury and others, the plaintiffs.

By a nominal deed of gift one Kali Prasanna Dhar transferred to his wife his entire non-transferable occupancy holding and subsequently sold a portion of it to one Krishna Mohan Dutt in the name of the latter's mother. Both these transactions were effected without the knowledge or consent of the landlords. After the sale, Kali Prasanna and his wife refused to pay rent for the transferred portion of the land on the ground that it was sold and relinquished in favour of the purchasers, and paid rent only for the portion of the holding which remained in his possession. The landlords accepted the apportionment of the rent for the portion occupied by the tenant, but declined to recognise the purchaser of the portion sold as his tenant. In a suit brought by the landlords against the purchasers and their vendors for the recovery of *khas* possession of the portion of the lands sold, the Court of first instance decreed the suit in favour of the 6 annas 7½ gundas co-sharer landlords and dismissed it against the others. On appeal by the defendants this suit was dismissed. The plaintiffs, therupon, appealed to the High Court.

Dr. Sarat Chandra Basak (with him *Babu Harihar Prasad Sinha*), for the appellant. The Full Bench case of *Dayamogi v. Ananda Mohan Roy Chowdhury* (1) was distinguishable. In the present case the

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Corporation (1), and to another in England, *Burgoine v. Taylor* (2). In my opinion, this appeal should be allowed and the suit restored on the conditions mentioned in the judgment of the Chief Justice.

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(2) (1878) L. R. 9 Ch. D. 1.

APPELLATE CIVIL.

Before Richardson and Imam JJ.

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BAMA SUNDARI DASEE.*

Landlord and Tenant—Non-transferable occupancy holding—Occupancy holder transferring part of his holding without the knowledge or consent of the landlord—Transfer, validity of—Non-payment of rent by tenant—Disclaimer—Suit by landlord for khas possession of the transferred portion

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in his possession, and where such apportionment of the rent was accepted by the landlords :—

Held, that such an act on the part of the tenant amounted to a disclaimer to all right, title and interest to the transferred part, and that the part transferred was at the disposal of the landlords, unless any third person could make out a good title to possession as against them

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SECOND APPEAL by Kunja Kishore Pal Chowdhury and others, the plaintiffs.

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tenant's refusal to pay rent to the landlords, for the portion of the holding sold by him on the ground that he had no interest in it, amounted to a disclaimer of all his interest in that portion of the holding. The landlords might have brought a suit for recovery of *khas* possession of the entire holding. This was not their sole remedy. They also had the additional right of recognising the division of the holding and the apportionment and acceptance of the rent for the portion occupied by the tenant. With respect to the divided portion of the holding transferred by the tenant, there existed no relationship of landlord and tenant between them and the transferee. The landlords, therefore, were entitled to re-enter upon the latter portion of the holding.

Babu Gobinda Chandra Dey Roy, for the respondent. The refusal of the tenant to pay rent for the portion of the tenancy transferred by him to the purchaser thereof, did not operate as a forfeiture. He was liable to the landlords for the rent of the entire holding. The landlords' remedy did not lie in a suit for *khas* possession of the transferred portion. Unless there was an abandonment of the entire holding by the tenant, the landlords could not re-enter upon a portion of it: see *Kabil Sardar v. Chunder Nath Nag Chowdhry* (1) where the very same question as in the present case arose. The principle of this decision was upheld in *Dayamoyi v. Ananda Mohan Roy Chowdhuri* (2).

The appellants were not called upon to reply.

RICHARDSON AND IMAM JJ. The holding in question in this suit originally belonged in its entirety to the defendant No. 3. He sold a portion of it to the defendant No. 2 in the name of the latter's mother, the

(1) (1892) I. L. R. 20 Calc. 590. (2) (1914) I. L. R. 42 Calc. 172.

defendant No. 1. The holding is found to be a non-transferable occupancy holding and, as we read the judgment of the learned Subordinate Judge in the lower Appellate Court, he has also found that, subsequently to the transfer of the portion of the holding, the defendant No. 3 refused to pay rent for that portion and tendered to the landlords the proportionate rent due in respect of the remainder of the holding, which the landlords accepted. The learned Subordinate Judge, in one part of his judgment, says this:—"The plaintiff's first witness Kamini, who is the Naib of the plaintiff's owning 6 annas and 7½ gundas share, deposes that the defendants Nos. 3 and 4 refused to pay rent for the land in suit as it was sold and that the defendant No. 3 paid rent for the lands other than the land in suit. The refusal to pay rent was due to the fact that the land had been sold." Then further on, the Subordinate Judge says:—"The refusal to pay rent was due to the fact that there was a sale and the alleged relinquishment was in favour of the purchaser." From these passages, we gather, as we have said, that the learned Subordinate Judge accepted the evidence of the plaintiff's Naib that, after the transfer in question, the defendant No. 3 refused to pay rent for the land he had transferred. In that state of things, it was, of course, open to the landlords to decline to accept an apportionment of the rent and to decline to recognise any division of the holding. On the defendant No. 3 refusing to pay the entire rent of the whole holding, the landlords might have instituted a rent suit and so brought the holding to sale in execution of any decree they might have obtained. But, in our opinion, this was not the only course open to the landlords. We can see no reason why the landlords should not be at liberty, if they so chose, to accept from the defendant No. 3 the amount of rent tendered

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by him for the land he still held without prejudice to any right which they might have as proprietors in respect of the transferred portion. The learned Subordinate Judge in the Court of appeal below has found on these facts that there was no surrender of the transferred portion in favour of the landlords. It seems to us, however, that only one conclusion is possible from the transfer coupled with the subsequent refusal to pay the rent of the transferred portion; clearly, that amounted on the part of the defendant No. 3 to a disclaimer of all right, title and interest in the transferred portion. He had transferred his interest as tenant to the defendant No. 2 and, as between him and the defendant No. 2, his interest as tenant was extinguished. As to the landlords, he put an end to the relationship of landlord and tenant by refusing to pay rent for this land. In our opinion the tenant, the defendant No. 3, by his own acts and conduct, made it as clear as possible that he had no further interest in the land. The land is, therefore, at the disposal of the landlords, unless any third person can make out a good title to possession as against them. The present case is easily distinguishable from those cases where, after transferring a portion of the holding, the tenant continues in possession of the remainder and continues to pay, or, at any rate, does not deny his liability to pay, the rent due in respect of the whole holding. In cases of that kind, it is familiar law that there is no abandonment or surrender of the holding either as a whole or in part. But the present case is very different; and the conclusion arrived at by the learned Subordinate Judge appears to us to be entirely inconsistent with the facts which he has found. On the materials before us the only conclusion possible is, as we have said, that the defendant No. 3 has ceased to have any interest in the transferred land. If that

be so, what are the rights to the land as between the transferee and the landlords? *Prima facie*, the landlords are entitled to the land. The transferee shows no title from the landlords; his title is derived from the defendant No. 3 who had no power to create a title good against the landlords. In the circumstances, we are of opinion that there is no answer to the landlord's suit. The result is that the decree of the lower Appellate Court must be set aside and that of the Court of first instance restored. The plaintiffs, the appellants before us, who are co-sharers in the land to the extent of 6 annas $7\frac{1}{2}$ gundas, are entitled under the latter decree to joint possession to the extent of their share. The other co-sharers were made party defendants, and no question is raised as to their share.

The appellants are entitled to their costs throughout from the contesting defendants.

O. M.

Appeal allowed

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CIVIL RULE.

Before D. Chatterjee and Beachcroft JJ.—

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Dec. 22.

MAHESH CHANDRA ADDY*v.***PANCHU MUDĀLI.***

Vakalatnama—Practice—High Court—Mofussil Courts—Vakalatnama, acceptance of, by pleaders—Endorsement if necessary—Civil Procedure Code (Act V of 1908), O. III, r. 4—High Court General Rules and Circular Orders, 1910, Vol I, Ch. XI, r. 45(e).

It is not necessary that the acceptance of a *vakalatnama* should be in writing, but the High Court General Rules and Circular Orders, 1910 Vol. I, Ch. XI, r. 45 (e) should be fully complied with by the pleader who accepts the *vakalatnama*.

Per D. CHATTERJEE J. An appearance or act by a pleader named in the *vakalatnama* (*without his accepting it in writing*) would, if allowed by the Court expressly or by implication, be valid and operative. The High Court rule, however, was made to be followed and is a salutary rule prescribed for safe-guarding the interests of litigants and should certainly be followed in the mofussil in the manner indicated by the construction placed on the same in the answers to the several references made to this Court. It must be fully complied with by the pleader who first accepts the *vakalatnama* and all subsequent acceptances must be made by endorsements made in the presence of the Court, or the *Sheristadar*, or the Bench officer and dated, provided of course all the pleaders so accepting a *vakalatnama* are named in it. Courts in the mofussil must be specially careful in enforcing this rule in cases of compromise and withdrawal of case, and withdrawal of money and documents.

Per BEACHCROFT J. There can be an acceptance by the pleader other than in writing. But if this Court has, in the exercise of its powers, framed certain rules which must be observed by pleaders, a pleader who does not conform to those rules, ought not to be heard.

* Civil Rule No. 662 of 1915, against the Order of Babu J. N. Ghosh Munsif of Puri, dismissing Small Cause Court Suit No 210 of 1915, dated April 17, 1915.

Quare: Whether after the first endorsement by a pleader accepting a *rakalatnama*, a mere endorsement of acceptance by those appearing on the strength of the original *rakalatnama* at subsequent stages of the case is sufficient.

RULE obtained by Mahesh Chandra Addy, the petitioner.

This was a Rule for restoration of a suit dismissed by the Munsif at Puri for default. The petitioner brought a suit in the Court of Small Causes at Puri against one Panchu Mudali and in his *vakalatnama* filed in that suit he mentioned the names of Babus Purna Chandra Addy, Rajkishore Das, Jogendra Chandra Mitra and several others as his pleaders. Of these Babu Purna Chandra Addy alone accepted the *vakalatnama* by endorsing his name on the back of it. On the 15th March, 1915, the said suit was called on for hearing. The defendant and his pleader were absent and so were the plaintiff and his pleader, Babu Purna Chandra Addy. The plaintiff's *gomastha*, however, was in Court and under the plaintiff's authority he instructed Babu Rajkishore Das and Jogendra Chandra Mitra to conduct the case on behalf of the plaintiff Babu Jogendra Chandra Mitra filed on behalf of the plaintiff a *hajira* of the witnesses present in Court. When the suit was called on for hearing, Babu Rajkishore Das attempted to conduct the case for the plaintiff by offering to examine the witnesses, but he was not permitted to do so by the Munsif on the ground that he had not accepted the *rakalatnama* already filed. The Munsif, however, directed him to file a *rakalatnama* duly accepted. In consequence of the absence of the plaintiff a fresh *rakalatnama* could not be filed and the suit was dismissed for default of the plaintiff as well as of the defendant. On the same day the Munsif issued a notice on Babu Jogendra Chandra Mitra to show cause why he should not

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be proceeded against under the Legal Practitioners Act. On the 29th March, 1915, the plaintiff filed an application for setting aside the order of dismissal for default and for restoration of the suit. On the Munsif directing that the plaintiff do file an affidavit in support of his application, such an affidavit sworn by the plaintiff's *gomastha* was duly filed on the 6th April, 1915. When the suit came on for hearing on the 17th April, 1915, the plaintiff's pleader was absent in Cuttack and one of the plaintiff's witnesses could not attend owing to illness. The plaintiff's *gomastha* under a special power of attorney filed a petition praying for the postponement of the case and with his petition he also filed a medical certificate from the Assistant Surgeon of the local Civil Hospital stating that the said witness was ill. The Munsif refused to postpone the case and dismissed the suit for default. Thereupon, the plaintiff applied to the High Court and obtained this Rule.

Babu Satya Charan Sinha, for the petitioner. A *vakalatnama* was not required to be accepted in writing by each pleader mentioned therein before he was entitled to appear. Any one of several pleaders whose names were mentioned in the *vakalatnama* had a right to appear in the case, even if he did not expressly accept the *vakalatnama*, provided there was an acceptance of it by only one of them and provided the pleader appearing was satisfied that the document was properly executed. In support of this contention see the letter written by the Registrar of this Court, dated the 19th November 1914, appearing in 19 C. W. N. xxvi, and also O. III, r. 4 of the Code of Civil Procedure. Reading this letter and this order together, the pleader was entitled to appear before the Munsif and conduct his client's case. As regards r. 45 (e) of the High Court General Rules and Circular

Orders, 1910, Vol. I, Chap. XI, this rule must be taken and read along with the Registrar's letter referred to and O. III, r. 4 of the Code and interpreted as stated.

No one appeared for the opposite party.

Cur. adv. vult.

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D. CHATTERJEE J. The whole trouble in this case is due to a misunderstanding and some uncertainty of practice in the acceptance of *vakalatnamas* in the mofussil.

The facts are that the petitioner filed a suit in the Small Cause Court at Puri in charge of the second Munsif and engaged three pleaders, Babus Poorna Chandra Addy, Rajkishore Das and Jogendra Chandra Mitra. Babu Poorna Chandra Addy accepted the *vakalatnama* by endorsing his name on its back as usual. The two other pleaders did not sign the *vakalatnama*. On the date of hearing Babu Jogendra Chandra signed the *hajira* of witnesses and Babu Rajkishore attempted to conduct the case by offering to examine the witnesses. There is some difference between the petitioner and the learned Munsif as to what then took place. The learned Munsif says he asked Rajkishore Babu to accept the *vakalatnama* on the record, the petitioner says Rajkishore Babu was asked to file a fresh *vakalatnama*. I take the facts as stated by the learned Munsif to be correct especially as there is no affidavit by the pleader and the *karpardaz* who swears the affidavit, does not know English and could not have understood what was said. But I cannot conceive why Rajkishore Babu should have allowed the case to be dismissed for default unless he misunderstood the order of the Court and thought that he was required to file a fresh *vakalatnama* which he could not do as his client was absent. As it is I think there was some such mistake and the

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case was dismissed for default and Babu Jogendra Chandra who had filed the *hajira* without signing the *vakalatnama* was given a notice to show cause why he should not be proceeded against under the Legal Practitioners Act. There was then an application for rehearing but that also ultimately failed as on the date of hearing an application for postponement was made by the agent of the client acting under a special power of attorney which was not registered. There is no provision in the Registration Act which makes the registration of a special power of attorney compulsory but the Court is not bound to presume its genuineness unless it is registered, see section 85 of the Evidence Act, and the learned Munsif was within his rights in refusing to act upon the application of the agent. As regards the acceptance of *vakalatnames* the practice in the High Court is that one or more vakils endorse their acceptance on the *vakalatnama* before it is filed, and if any other vakil named in the *vakalatnama* wants to accept it later, he makes his endorsement before the Deputy Registrar or his assistant and the endorsement is initialled by the said officer and dated. Vakils who are engaged later generally endorse their acceptance when the record is in the Bench but many vakils work without endorsing their acceptance unless the omission is brought to their notice.

O. III, r. 4 of the Civil Procedure Code does not expressly say that the acceptance of the *vakalatnama* should be in writing and it was held by Banerjee J. in 1901, in the case of *Shama Prosad Ghose v. Taki Mullik* (1) that under similar provisions of section 39 of the old Code no writing was necessary for the acceptance of a *vakalatnama* and it was sufficient if the vakil acting was named as one of those authorised in the

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body of the *vakalatnama*. This matter came before the English Committee of this Court in April 1910 upon a reference from the District Judge of Khulna and the learned Judges (Sir Lawrence Jenkins C. J., Harrington J., Brett J., Mookerjee J. and Carnduff J.) directed the Registrar to say that Or. III, r. 4 does not require the acceptance of a *vakalatnama* to be in writing. The matter came up again in 1914 upon a reference from the District Judge of Tipperah and the same answer was given. The letter of the Registrar in that case is printed in 19 C. W. N. XXVI. The file shows that r. 45(e) of the High Court Rules and circulars published in 1910 was referred to by the District Judge. It appears, however, from enquiries made from the Registrar of the Appellate Side that the answer was given in accordance with the precedent in the Khulna case, without placing the matter before the English Committee again. The next reference was by the District Judge of Cuttack in 1915 made in consequence of a representation from the Puri Bar Association objecting to an order of the 2nd Munsif of Puri, directing that every acceptance of a *vakalatnama* must be in compliance with r. 45(e) Chap. XI p. 301, Vol. I, General Rules and Circular Orders (Ed. 1910) whether it is before or after the *vakalatnama* is filed and the same answer was given directing that in case of a subsequent acceptance by a new pleader of a *vakalatnama* previously filed by another pleader, the date of the acceptance should be added. This answer was also given by the Registrar on the authority of the Khulna case without any fresh consideration by the English Committee. All these references, however, deal with the case of several acceptances of the same *vakalatnama* by several pleaders at different times, and none of them deals with the case of a pleader acting without accepting the *vakalatnama* in writing.

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I think that Or. III r. 4 of the Civil Procedure Code does not require that the acceptance of a *vakalatnama* should be in writing.

An appearance or act therefore by a pleader named in the *vakalatnama* would, if allowed by the Court expressly or by implication, be valid and operative. The High Court rule, however, was made to be followed and is a salutary rule prescribed for safeguarding the interests of litigants and should certainly be followed in the mofussil in the manner indicated by the construction placed on the same in the answers to the several references. It must be fully complied with by the pleader who first accepts the *vakalatnama* and all subsequent acceptances must be made by endorsements made in the presence of the Court or the *Sheristadar* or the Bench officer and dated, provided of course all the pleaders so accepting a *vakalatnama* are named in it. Courts in the mofussil must be specially careful in enforcing this rule in cases of compromise and withdrawal of cases and withdrawal of money and documents.

There was evidently a misconception in this case Rajkishore Babu retired as he probably thought he was required to file a fresh *vakalatnam*, which he was not in a position to do and the learned Mansif held that "Babu Jogendra Chandra who had filed the *hajira* had no authority from the plaintiff to file the same." As I have shewn above Babu Jogendra Chandra had been duly authorised by the *vakalatnama* to represent the plaintiff and had signified his acceptance of the same by acting as aforesaid and would presumably have put down his signature on the *vakalatnama* if the omission had been brought to his notice. I therefore make the Rule absolute and direct that the case be restored to the file and tried in due course of law.

BEACHCROFT J. The petitioner obtained this Rule mainly on the strength of allegations in the affidavit to the effect that the learned Munsif sitting as Judge of the Small Cause Court would not allow his pleader Babu Raj Kishore Dass to examine his witnesses, as the pleader had not accepted the *rakalatnama* already filed, and directed the pleader to file a fresh *rakalatnama*, which the pleader was unable to do in the absence of the petitioner, in consequence of which the suit was dismissed for default. In support of the rule it has been argued that Or. III r. 4 of the Civil Procedure Code does not require the acceptance of the pleader to be in writing. In addition to the opinion expressed by Banerjee J. in *Sham'i Prosad Ghose v. Taki Mullik* (1) to the effect that acceptance need not be in writing reliance was placed on an article in Vol. 19 of the Calcutta Weekly Notes page XXVI in which it was alleged, quoting the letter of the Registrar of the Appellate Side of this Court, that the High Court refused to accept a recommendation of the District Judge of Tipperah, that all the pleaders who wished to appear in a case must sign the *rakalatnama* before it is filed in Court. In fact it appears that the recommendation of the District Judge of Tipperah was not brought to the notice of the Judges, but was dealt with by the Registrar on the precedent of an answer given to the District Judge of Khulna in 1910. On that occasion an enquiry by the District Judge was considered by the English Committee and an answer was sent based on the opinion expressed by Banerjee J. It does not appear, however, that any reference was made to r. 45(e) in Chap. XI of the Court's General Rules and Circular Orders, a rule which had been made subsequently to the decision in *Sham'i Prosad Ghose v. Taki Mullik* (1).

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That Rule requires that a pleader accepting a *vakalatnama* shall note on it the name of the person from whom it has been received with an endorsement to the effect that he is satisfied that the person from whom he received it is either the party himself or a certificated Mukhtear or one who has been authorised by the party to deliver it to him as the case may be. The learned Munsif appears to be of opinion that the introduction of this rule has had the effect of making acceptance in writing obligatory by a pleader accepting a *vakalatnama*. I do not think that that is the effect of the rule. I am of opinion that there can still be an acceptance by the pleader other than in writing. But if this Court has, in the exercise of its powers, framed certain rules which must be observed by pleaders, a pleader who does not conform to those rules ought not to be heard. Although there may be an acceptance as between party and pleader, other than in writing, if the rules require that a pleader is to sign the *vakalatnama* or make any particular endorsement on it the Court before which the pleader practices ought to insist on the rule being observed before it allows him to plead.

Coming to the facts of this particular case I am certainly not prepared to accept the allegation that the Munsif asked the pleaders to file a fresh *vakalatnama*. The learned Munsif has sent an account of what happened, viz., that he asked the pleader if he had accepted the *vakalatnama* already filed, the pleader replied that he had not, the Munsif then told the pleader that if he accepted it he might appear otherwise not, and the pleader did not accept the *vakalatnama*. I will assume in favour of the petitioner that when the Munsif speaks of acceptance he refers to the making of such endorsements as are required by r. 45 (e) already referred to.

The Munsif's account of what happened concludes the matter. But in any case even if the Munsif had not denied the allegation in the affidavit, there would be nothing before us to justify the view that the Munsif had asked for a fresh *vakalatnamā*. The affidavit is sworn by a person who does not know English, while the conversation in Court took place in English, and the affidavit is in the qualified form "the facts stated are true to the best of my knowledge" without any information as to the source of the knowledge. Affidavits thus qualified are constantly being made and it is as constantly pointed out that the qualification renders the affidavit useless as evidence of any particular fact.

Nor am I prepared to take the view that the pleader misunderstood what the learned Munsif said. The pleader himself does not say so. I know that there is a general objection among the members of the profession to swearing affidavits, an objection for which in many cases there is no justification. I can well understand a pleader objecting to swear an affidavit if that involves his alleging facts which throw discredit on the conduct or work of a Judicial officer in whose Court he has to practice, but I do not see what considerations can stand in the way of his saying, if true, that he was mistaken in what the Judicial officer said. Now far from there being any misunderstanding in this case, there is every reason for thinking that the Munsif wanted the pleader to make the endorsement required by r. 45 (e) and that the pleader deliberately refused to make it.

It is clear from the papers before us that the Munsif has been trying to enforce the complete observance of the rule not only by the first pleader accepting a *vakalatnamā* but by those appearing on the strength of the original *vakalatnamā* at

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subsequent stages of the case, while the members of the Bar have maintained the position that after the first endorsement, a mere endorsement of acceptance is sufficient in the case of pleaders subsequently appearing, and there is no doubt that there was—for I understand that the learned Munsif has been transferred—considerable friction between him and the members of the Bar. It is not necessary, nor have we the materials, to attempt to apportion the blame for this state of affairs, but apparently both sides held their ground, and I believe the present incident was merely an outcome of this difference of opinion. Incidentally I may observe that this state of things led to a reference by the District Judge to this Court which was unfortunately disposed of by the Registrar on the authority of the reply given to the District Judge of Khulna, though the point referred was an entirely new one.

It is not necessary in the present case to decide which of the two views of r. 45 (e) advanced is the correct one, though there is something to be said in favour of both.

What does concern us in the present case is whether we ought to interfere with the order dismissing the suit. It is true no doubt that we have on the one hand an affidavit giving a garbled account by a person who was not in a position to understand what actually took place: perhaps he was misled. On the other hand it is hardly fair to make the litigant suffer for a difference of opinion between the Court and the pleader as to the latter's duties.

I, therefore, agree to the order proposed by my learned brother.

O. M.

Rule absolute.

PRIVY COUNCIL.

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March 20,
21.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA, AT RANGOON].

Mortgage—Equitable mortgage—Security, scope of—Title-deeds deposited as security, and endorsement made on promissory note given—Addition subsequently made to memorandum endorsed on note—Scope of security limited to original memorandum

Where title-deeds of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title-deeds. Where, however, title-deeds are handed over accompanied by a bargain, that bargain must rule. Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security.

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The plaintiff was the appellant to His Majesty in Council.

This appeal raised questions as to whether the appellant held an equitable mortgage upon certain leasehold land and premises known as No. 92 Strand Road, Rangoon, which were purchased by the respondent in 1909 at a sale by auction in execution of a decree, and whether, if he holds such an equitable mortgage, he could assert it as against the respondent.

The Court of Original Jurisdiction (S. M. ROBINSON Judge) decided the case in favour of the plaintiff.

The Appellate Court (H. S. HARTNOLL, officiating Chief Judge, and D. H. R. TWOMEY, Judge) set aside the decree of the original Court so far as the present respondent is concerned, and dismissed the suit as against him.

The judgment, on appeal, in which the facts are stated, was delivered by MR. TWOMEY (MR. HARTNOLL concurring) and was as follows:—

"The plaintiff P. J. Mehta sued the 1st and 2nd defendants, Ma Saw and her husband Maung Thin, on a promissory-note for Rs 13,000 executed by them on 1st June, 1906 in favour of R. Jagjivan and Company. P. J. Mehta, the plaintiff, alleged that the pro-note was subsequently endorsed to him for valuable consideration by R. Jagjivan and Company who also delivered to him the title deeds of certain immoveable property which had been deposited with them as collateral security at the time of execution. The plaintiff asked that the balance of principal and interest due on the pro-note should be decreed in his favour and that a mortgage decree should be granted in respect of the property of which the title deeds were deposited as collateral security. He also prayed for a declaration that his equitable mortgage on the property in question should have priority over a later registered mortgage executed on 25th January 1908 by Ma Saw and her husband in favour of a Chetty firm for Rs 15,000.

"In July 1909 before the suit came to trial, the immoveable property in question, viz., plots Nos. 65, 66 and 66 A in Block Z-1, also known as No. 92, Strand Road, was sold by auction in execution of a decree obtained by a stranger to this suit against Ma Saw in the Small Cause Court, Rangoon. In the proclamation of sale it was stated that the property was to be sold free from the Chetty's mortgage, but that M. Pranjivan

and Company (the firm of which P. J. Mehta is the proprietor) claimed an equitable mortgage on the property for Rs. 13,000 and interest. Thus it was clear from the proclamation that the purchaser would take the property clear from the Chetty's mortgage but liable for P. J. Mehta's equitable mortgage if the existence of that mortgage should afterwards be established.

"The property was bought by one Chan Ma Phee for Rs. 20,000.

"After the sale Chan Ma Phee, the auction purchaser, was joined as co-defendant in the suit brought by P. J. Mehta to establish his equitable mortgage. The plaintiff in a petition dated 21st July 1909 prayed that his lien on the property should be declared as against Chan Ma Phee.

Chan Ma Phee filed a written statement pleading that he had bought the property free from incumbrances and putting the plaintiff to strict proof of his title.

"The learned Judge on the Original Side has held it proved that at the time of the execution of the promissory note the title deeds of the property in suit were deposited as security and that the plaintiff had an equitable mortgage on the property purchased by Chan Ma Phee.

"The first ground of Chan Ma Phee's appeal is that the learned Judge erred in holding that the plaintiff had an equitable mortgage on the premises in question.

"Ma Siw, the borrower, was the successor in title of the original lessees of two adjoining sites at the Strand Road and of 14th Street. One of these sites, No. 67, has a frontage on 14th Street but is shut off from the Strand Road by the other site comprising plots 65, 66 and 66 A. These three plots together are known as No. 92, Strand Road, while plot No. 67 is known as No. 87, 14th Street. There is a large house on No. 92, Strand Road, and a small house on No. 87, 14th Street. The evidence shows that the same two houses were standing on the two sites at the time of the

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being made of Strand Road. There is further reason to doubt the accuracy of the Record-keeper's evidence for he says there was no plot numbered 65 in 1884, while Exhibit C is an actual lease of plot No. 65 in that year.

"Exhibit E is a conveyance dated 3rd January 1901 by one Ma Lin to Ko Tha Gywe of house site No. 88, 14th Street. (I gather that Ko Tha Gywe was Ma Thit's husband and that Ma Saw is their daughter.) This plot would seem very probably to be a portion of plot No. 66 from the boundaries mentioned in the conveyance.

"It is clear that the two areas known as No. 87, 14th Street and No. 92, Strand Road, have all along been held under separate title deeds. The plaintiff claims an equitable mortgage over both of them. They were both sold in the execution proceedings of July 1909 and the plaintiff himself bought the smaller property No. 87, 14th Street, for Rs. 4,000 odd while Chan Ma Phee, the appellant, bought the larger property No. 92, Strand Road, for Rs. 20,000. The plaintiff's case is that the two leases (or agreements to lease) Exhibits B and C and the two sale deeds Exhibits D and E were given over as security—when Ma Saw's predecessor in title, Maung Tha Gywe, first borrowed Rs. 5,000 on 10th October 1902 from the firm R. Jagjivan and Co. His claim rests, however, on the promissory note of 1st June 1906 for Rs. 13,000 signed by 'Ma Saw' and endorsed by her with the note:—As security—Grant of a house in 14th Street."

"The words 'Strand Road and' were afterwards written making the note appear as follows:—'As security—Grant of a house in Strand Road and 14th Street.'

"This addition was admittedly made several months after Ma Saw had signed the note.

"The entries in the books of account produced by the plaintiff to prove the various transactions with Ma Saw refer only to the mortgage of 'the house,' always in the singular.

"On the evidence produced by the plaintiff it cannot in my opinion be held that the title deeds of the Strand Road house were delivered to the lenders by way of security. The endorsement signed by Ma Saw at the time related only to the 14th Street house and the entries in the plaintiff's books, support the view that only one house and site was given as security. This documentary evidence appears to me to outweigh altogether the conflicting oral evidence of the plaintiff's witness, Nanalal Kalidas."

On this appeal,

De Gruyther, K. C., and J. M. Parikh, for the appellant, contended that the equitable mortgage extended to both houses. The mortgage on No. 92, Strand Road was not distinct from that on No. 87, 14th Street, the

mortgage on the property in suit being in fact one transaction, and the Appellate Court was wrong in allowing a contention to the contrary to be raised as a pure question of fact for the first time on appeal. The two houses had not all along been held under separate title deeds; the title deeds of the Strand Road house were deposited with the lenders by way of security; the fact was that the plot No. 67 of the lease of 1908 was not identical with the plot No. 67 of the plan annexed to the lease of 2nd April 1881. At the time of the execution of the promissory note the whole of the leasehold property consisted of a house and stables which had subsequently come to be known as house No. 92, Strand Road, and house No. 87, 14th Street, respectively. The evidence on the record, it was contended, established that at the time the promissory note was executed the title deeds of the whole of the property were deposited with the lenders by way of equitable mortgage thereon, which was not, it was submitted, limited by the original memorandum endorsed on the promissory note, which was not the contract. Reference was made to *Ashton v. Dalton* (1), *Ex parte Kensington* (2), and Evidence Act (I of 1872), sections 91, 92.

Sir Erle Richards, K.C., and F.J. Coltman, for the respondent, were not called on.

The judgment of their Lordships was delivered by

LORD SHAW. Their Lordships think it unnecessary in this case to call upon learned counsel for the respondent. They are of opinion that the judgment of the Chief Court of Lower Burma appealed from is correct.

The rights of the parties have to be determined, in their Lordships' opinion by a written agreement,

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which is, in their Lordships' view, the limit and standard fully measuring the obligations of Mah Saw, who obtained an advance of 13,000 rupees from the respondent on the 1st June, 1906.

On that date there was a notandum put upon the back of a promissory note then granted, and the notandum is to this effect: "As security, grant of a house in 14th Street, Rangoon." Their Lordships take no stock of an alteration made after that notandum was signed, by which there was an interpolation of the words "Strand Road and," which words would have, in appearance at least, extended the scope of the security from "a house in 14th Street, Rangoon," to "a house in Strand Road and 14th Street, Rangoon." Had an argument been raised as to whether, this alteration having been made, any rights in law could now be founded upon this document, that argument would have been considered: but it is unnecessary to make any pronouncement upon this topic, and accordingly their Lordships deal with the document signed by Mah Saw on the 1st June, 1906, as definitely limiting and describing the scope of the security. It was a "grant," in the singular, "of a house," in the singular, "in 14th Street, Rangoon."

The law upon this subject is beyond any doubt. (i) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (ii) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (iii) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. In the words of Lord Cairns in the leading case of *Shaw v. Foster* (1):—

"Although it is a well-established rule of equity that a deposit of a

document of title, without more, without writing or without word of mouth will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

Their Lordships accordingly have admitted in argument the only possible question which remains (standing the document specifying the security and signed by Mah Saw), namely, the question of identification of the term "grant of a house in 14th Street, Rangoon." To identify this grant, a reference has been made by learned counsel for the appellant, to the various title-deeds of the properties called Plots 65, 66, 66A, and 67. These deeds are as follows: With reference to Plot 65, there is a lease of land in favour of a person named Ma Thit, who was the mother of Mah Saw. With reference to Plot 66, and apparently also to 66A, there is a document for sale of a house and of land in favour of Ma Thit. But then, with reference to the last document, namely, as to Plot 67, there is a "grant of a house," a conveyance of a house on the 3rd January, 1901, in favour of Ko Tha Gywe. Ko Tha Gywe was the husband of the grantee, or lessee, of the other plots of ground covered by the other documents. He was the father of Mah Saw.

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but also the title-deeds of the other three properties which belonged not to himself, but to his wife. It was on this occasion that all these titles found their way into the hands of the lenders. Mah Saw succeeded to Ko Tha Gywe in the ownership of the house on Plot 67.

Their Lordships have, in these circumstances, no doubt whatsoever that the identification of the "grant of a house in 14th Street, Rangoon," by her is accomplished by a reference to the conveyance of the house in favour of Ko Tha Gywe, which house had been his property when the original advance of 5,000 rupees, some years before, was obtained by him.

Their Lordships finally remark that, as against this identification of the house in 14th Street there is no evidence at all satisfactory in this case, and it was for the persons holding this security clearly to satisfy the Court of the scope thereof. They have not done so. There is nothing in the case which confirms the view that, under the term "grant of a house," which would be a singular term applicable to a singular title, there was included the subject of three other plots of land under leases. Their Lordships cannot assent to such a construction. They think the security is distinctly and by contract limited, and they cannot extend it as desired. They have no doubt that the Chief Court of Lower Burma has reached a proper conclusion.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

J. V. W.

Appeal dismissed.

Solicitor for the appellant: *Edward Dalgado.*

Solicitors for the respondent: *Arnould & Son.*

FULL BENCH.

*Before Sanderson C.J., Wodroffe, Mookerjee, Chitty and
N. R. Chatterjee JJ.*

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May 8.

SAIT SUMARI MULL.*

Revisor—Procedure and practice—Execution of decree—Decree barred by limitation—Application for transmission—Notice—Order on the notice, effect of—Master, authority of—Court, Jurisdiction of—Civil Procedure Code (Act XIV of 1882) ss. 223, 224, 235, 248 and 249—Belchambers' Rules and Orders, rule 370—Limitation Acts (XV of 1877) Sch. II, Arts. 179 and 180; (IX of 1908) Sch. I, Arts. 182 and 183

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CRAUTERER Held, that the application of the 1st June, 1908, and the order of the 30th June, 1908, did not constitute a revivor within article 183 of the 1st Schedule of the Limitation Act, 1908.

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MULL. *Per SANDERSON C J.* The substance and not the form of the matter must be looked at; and considered from that point of view the application was for the transmission of a certified copy of a decree together with a certificate of non-satisfaction and no more, and the order made in substance was that the application should be granted.

The notice which was issued under s. 948 was inapplicable to the proceedings in question.

The question whether a decree was capable of execution would have to be determined by the Court itself under s. 249 of the Civil Procedure Code.

The Registrar was not clothed with authority to decide such a question as arises in this case, viz., whether the decree was barred by the Statute of Limitation.

Rule 370 in Belchambers' Rules and Orders was not consistent with the scheme of the Code of 1882.

These rules must be read as modified by the Civil Procedure Code, 1882, under which the application in this case was made, and the notice issued and the order made did not operate as a revivor within the meaning of article 183 of the Limitation Act, Schedule I.

The fact that the word "Revivor" is used in Article 183, instead of the different matters specified in article 182 being set out again or referred to in article 183 as might have been done, shows that something different to such matters was intended. Further, the conditions dealt with by the two clauses are essentially different and the periods of limitation vary materially.

Per WOODROFFE J. An order for transmission as such is not an order on an application for execution, though it is an order on an application in execution. It is a proceeding taken with a view to further action by way of execution elsewhere on which action, unless previously determined, the question of the right to execute the decree is decided.

If the Registrar had power to issue as a "quasi-judicial Act" notice under s. 248, he had no power to determine judicially that the decree was alive had the debtor contested the point. The Judge must have done that and the fact that the debtor did not appear on the notice, cannot give the order passed that judicial character which is necessary for an order operating as revivor.

The last two words of the Order ("Let execution issue as prayed") make the order operative as one for transmission of the decree; for this was what was asked.

Per Mookerjee J. Section 230 makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution, while the explanation to section 248 shows that the notice required by that section must, where the decree has been transmitted, be issued by the Court to which the decree has been sent for execution. Consequently, the issue of the notice in this case under section 248, on the basis of the application for transmission of the decree, was not in conformity with the Code of 1892 which was in force at the time.

Upon the application for transmission of the decree under section 223, a notice under section 248 could not properly be issued; such notice though issued did not by itself operate as revivor of the decree and there was not in fact, and could not in law be, such a determination by the Master under section 249 as would operate to revive the decree.

REFERENCE to a Full Bench on the appeal by the judgment-debtor, Chutterput Singh, from the judgment of Chaudhuri J.

In a suit brought by one Rui Sati Sumati Mull Bahadur and others against Chutterput Singh the High Court in its Ordinary Original Civil Jurisdiction passed an *ex parte* decree on the 21st May, 1896, for the sum of Rs. 46,671-9-3, with interest and costs in favour of the plaintiffs. On the 2nd September, 1896, they made an application for execution by transmission of a certified copy of the decree to the District Court of Purnea. This certified copy of the decree was returned to the High Court as unsatisfied from Purnea and on the 15th May, 1899, the plaintiffs further applied to the High Court for execution of the said decree by the arrest and imprisonment of the defendant. On the 12th February, 1900, an order was made in the said execution proceedings, directing attachment to issue against the person of the defendant and the warrant of arrest so directed to issue was made returnable on the 12th March, 1900, on which date there was an extension of the returnable date thereof for three months. On the plaintiff's subsequent applications the returnable date was extended from time to time.

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and was finally fixed for the 12th July, 1901, after which date the said warrant ceased to have any force. Thereafter, a fresh application dated the 30th May, 1908, was made to the High Court for execution of the said decree by transmission of a certified copy of the decree and a certificate of *non-satisfaction* to the District Court of Murshidabad for attachment of the defendant's property situate within the jurisdiction of that Court. This application was made on the tabular form provided under section 235 of the Code of Civil Procedure, 1882, for execution of the decree. In the last column of this tabular form the particulars set out were as follows:—"By transmission of a certified copy of the said decree together with a certificate of *non-satisfaction* to the Court of the District Judge of Murshidabad within whose jurisdiction the defendant has property and by attachment and sale of which the plaintiffs' claim may be satisfied. The defendant has no property within the jurisdiction of this Honourable Court, whereby the decree can be satisfied. The defendant's petition in Insolvency has been dismissed on the 8th June last and his creditors have attached his properties at Murshidabad, which are going to be sold shortly." On the 1st June, 1908, the Master directed notice to issue under section 248 (a) with leave to verify. Notice was thereupon served upon the defendant and on the 30th June, 1908, the Master made the following order on the plaintiffs' application:—"Upon reading the notice and the affidavit of service, no cause being shown let execution issue as prayed." On the 17th July, 1908, the said copy of the decree and the certificate of *non-satisfaction* were transmitted to the District Court of Murshidabad. Thereafter no further steps were taken by the plaintiffs until the 18th January, 1915, when an application was made to the High Court in its

Ordinary Original Civil Jurisdiction for execution by attachment of the defendant's property, No. 147, Cotton Street, situate in Calcutta. On the 10th June, 1915, the order for execution was made on this application. The defendant thus issued, on the 19th July, 1915, a notice of application to set aside this attachment. This application was fixed for hearing on the 26th July, 1915, and it was finally heard and dismissed by Mr. Justice Chaudhuri, sitting on the Original Side of the High Court, on the 2nd August, 1915. The defendant, thereupon, appealed.

The appeal on coming on for hearing before Sanderson C.J., and Woodroffe and Mookerjee J.J. their Lordships made a reference to a Full Bench in the following terms :

"The question we propose to refer to the decision of a Full Bench is whether the application of the 1st June, 1908, and the order of the 30th June, 1909, constitute a revivor within the meaning of article 183 of the First Schedule to the Indian Limitation Act, 1908."

Mr. Jackson (with him *Mr. M. N. Basu* and *Mr. B. N. Bose*), for the appellant. Although the order of the 12th February, 1900, constituted a revivor of the decree of the 21st May, 1896, this decree has since been barred, inasmuch as more than 12 years had elapsed between the former date and the 18th January, 1915, the date of the present application for execution. The decree in question was, therefore, incapable of execution. The order of the 30th June, 1908, had not the effect of a revivor under article 180 of the 2nd Schedule of the Limitation Act, 1877. It was not an order for execution, but merely an order for transmission. Execution orders were required to be made by the Court executing the decree. Under Chapter XIX of the Code of Civil Procedure, 1882 ("Execution of Decrees"), the sections on transmission were dealt separately from the sections on the mode of executing

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decrees. Section 250 provided that after all preliminary measures had been taken the Court issued its warrant for the execution of the decree. The application of 1908 in the present suit was under the transmission sections, section 223, as was clearly indicated in the particulars in the last column of the tabulated form on which the order of the Master was made. This order read with the said particulars in the last column was clearly an order under section 224 and the respondents must make a substantive application for execution to the Court to which the decree was transmitted. This substantive application if made in time would operate as a revivor under article 180 of the Limitation Act, 1877. As no other form existed in the Code, applications for transmission had to be made on the tabular statement provided for applications under section 235, but this did not constitute it an application for execution. Such an application as the one in question in this case was not, therefore, an application for execution under section 248, but was an application under section 223. See Hechle's Rules and Orders, p. 204, note "On Petitions." In support of the contention that the application for transmission did not constitute a revivor unless a substantive application for execution was made, the cases of *Umesh Chunder Dutta v. Sonder Narain Deo* (1), *Suja Hossein v. Monohur Das* (2), *Nilmony Singh Deo v. Biressur Banerjee* (3) and *Chatterput Singh v. Daya Chand Marwari* (4) were relied on. The decision in *Suja Hossein v. Monohur Das* (2) was against the order of the Subordinate Judge of the 24-Parganas and was in conflict with the decision against the decree of the same Subordinate Judge in the same case *Suja Hossein v. Monohur Das* (5). There

(1) (1889) I. L. R. 16 Calc. 747

(3) (1889) I. L. R. 16 Calc. 744.

(2) (1895) I. L. R. 22 Calc. 921.

(4) (1911) 23 C. L. J. 641.

(5) (1896) I. L. R. 24 Calc. 244.

was no authority which permitted two Judges to overrule two other Judges in the same identical case. The cases of *Monohar Das v. Fulteh Chand* (1), *Umrao Singh v. Lachmi Narain* (2) and *Bhabani Charan Dutt v. Pratap Chandra Ghosh* (3) were expressly based on the decision in *Suja Hossain v. Monohur Das* (4) and were wrongly decided. The case of *Beni Madho v. Shiva Narain* (5) was also wrongly decided. Revivor, therefore, existed where an application had been made for execution and not in the case of an application for transmission merely. The true test of what revivor meant was afforded in the case of *Kamini Debi v. Agkore Nath Mukherjee* (6).

The Advocate-General (Sir S. P. Sinha) (with him Mr. B. L. Miller and Mr. H. C. Majumdar), for the respondents. The application on which the Master's order of the 30th June, 1908, was made, was an application for execution of the plaintiffs' decree under section 235 of the Code of 1882, by attachment and sale of the defendant's property. See the cases of *Sribary Mundut v. Murari Chowdhury* (7) and *Raja Sremath Roy v. Romesh Chandra Acharyya Chaudhuri* (8). Application for execution must be always entertained by the Court which passed the decree and such Court had jurisdiction to issue notice on the judgment-debtor under section 238 of the Code. The High Court, therefore, could deal with the present case. The judgment-debtor on receipt of such notice was entitled to appear and show cause. The defendant, however, in the present case did not appear on the notice and leave was given to the plaintiffs to execute their decree. Execution could not be carried out until such leave

- (1) (1901) 1 L. R. 562 979
 (2) (1901) 1 L. R. 26 AP 501
 (3) (1901) 1 C. W. N. 275
 (4) (1881) 1 L. R. 242 244

- (5) (1905) 1 A. C. T. 242
 (6) (1899) 1 L. C. T. 221
 (7) (1891) 1 L. R. 126 277
 (8) (1892) 1 L. R. 126 277

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had been obtained. This leave operated as a revivor. Inasmuch as the defendant's property lay outside the jurisdiction of this Court, this Court had no power to deal with it. The order for transmission of the decree was, therefore, a necessity and judicial discretion had to be exercised in such an order. In making the order for transmission this Court treated the decree as capable of execution and there was no need for the order to have been one for execution. The true test for revivor was, whether the decree was capable of execution, and not, whether an application for execution was followed by an order for execution. The issue of such an order only indirectly dealt with the question of limitation. The sending of the notice to the defendant to show cause was an adjudication in the matter and was a step in aid of execution and the High Court in making the order of the 30th June, 1908, considered the decree capable of execution. This order remained good so long as it was not set aside on appeal: *Husein Ahmad Kaka v. Saju Mahamad Sahid* (1). Revivor, must clearly be by proceeding in the Court which passed the decree and there could not be any proceeding in another Court to revive a proceeding in the High Court. If the decree was in a state requiring reviving, the reviving could not be done by an inferior Court. It was not the same thing as if execution were applied for within a year of the passing of the decree and the application was made to an inferior Court; for in such a case the decree would not be in a state of suspended animation requiring some act to be done to revive it. By the application for transmission the High Court in the present case did not become denuded of its jurisdiction to deal with the question of revivor.

Article 183 of the 1st Schedule of the Limitation

(1) (1890) I.L.R. 15 Bom. 28.

Act, 1908, governed the present case and the order of 1916
 the Master of the 30th June, 1908, operated as a ~~CHUTTERAPUR~~
 revivor. In a decree of a mofussil Court there would ~~SINGH~~
 be no doubt that the issue of notice under section 248 ~~SAIT SUMAR~~
⁵ of the Code of 1882 gave a fresh reckoning point from ~~MULL~~
 which the period of limitation would have to be calculated and under article 182 of the Limitation Act this decree was not barred if the application for execution were made before the period fixed by the article expired. A mere application for transmission was sufficient and there was no case which laid down that an order for execution was necessary. As there was no such restriction in respect of mofussil decrees, still less ought there to be this restriction in respect of High Court decrees. Article 183, which applied to the High Court decrees, in the portion dealing with "revivor," must be construed in the light of clauses (5) and (6) of article 182 of the Act which was applicable to decrees of mofussil Courts. The first use of the word "revivor" with reference to decreees of the High Court established by Royal Charter was made in section 19 of the Limitation Act, XIV of 1859. This section was followed by articles 167 and 169 of the Limitation Act of 1871 by articles 179 and 180 of the Limitation Act of 1877 and by articles 182 and 183 of the Limitation Act of 1908. In effect section 19 of the Limitation Act of 1859 was the same as article 183 of the present Act. In *Ishwar Dutt v. Doorga Churn Chatterjee* (1) it was laid down that an order for execution made after notice to show cause created a revivor. There was no reason why the legislature should restrict a High Court decreeholder to a substantive order for execution when it provided other points outside the Court's jurisdiction as starting

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SINGH The procedure in the present case had its origin in the procedure which existed in the Supreme Court, where execution proceedings were taken out on the Equity side of the Court by a bill of revivor and on the Common Law side by a writ of *scire facias*. The cases of *Ashootosh Dutt v. Doorga Churn Chatterjee* (1) and *Futteh Narain Chowdhry v. Chundrabati Chowdhry* (2) set out the procedure for revivor of judgments as it existed in the Supreme Court and held that an order for execution under the Code had, on the Original Side of the High Court, the same effect as an award of execution in pursuance of a writ of *scire facias* had under the procedure of the Supreme Court, i.e., it created a revivor of a decree. These two sets of procedure in the Supreme Court were finally consolidated in section 261 of the Code of 1859, which was subsequently made applicable to the High Court by the Charter of 1861 and the Letters Patent, 1865, cl. 37. Under the Charter of 1774, cl. 38, authority was given to the Supreme Court to make rules of practice, which had to be submitted to the Privy Council for sanction. Subsequently, with the establishment of the High Court the power to make rules was conferred on the High Court by the Letters Patent, 1865, cl. 37, and thereafter, the Codes always left the procedure in the High Court to be regulated by its own rules. See section 639 of the Code of 1877, corresponding with section 652 of the Code of 1882, and also Rules 47, 49, 50 and 51 in Belchambers' Rules and Orders. The rules of the Supreme Court were adopted by the High Court. So long as these rules were applicable to cases and not inconsistent with the Letters Patent, 1865, or the Code of 1859, they were

(1) (1880) I. L. R. 6 Calc. 504. (2) (1892) I. L. R. 20 Calc. 551.

not *ultra vires*. The rules in Belchambers' Rules and Orders were framed by the High Court in pursuance of the powers conferred by the Letters Patent and the Codes. These rules, therefore, regulated the procedure in the High Court and whether they were consistent with the Code or not, they were operative so long as they did not militate against the provisions of the Letters Patent. There was nothing to show that these rules as they existed in 1908 were inconsistent with the Letters Patent or with the Code. Under section 637 of the Code of 1882, corresponding with section 637 of the Code of 1877 the Registrar was empowered to deal with *non-judicial* or *quasi-judicial* matters. Under Rules 515 A and 515 B, cl. 39, the Registrar was authorised to issue such notice as in the present case. Further, the action of the Master in making the order of the 30th June, 1908, was such as was conferred on him by the Code. Under rule 370 the certificate of *non-satisfaction*, which had to be in the form of execution and not of transmission, was required to state that the notice under section 218 of the Code of 1882 had been issued. This statement was made mandatory. The order on the notice was not required to be an order for execution. There was nothing to indicate that rule 370 was *ultra vires*. It was in accordance with the Letters Patent and was certainly not in conflict with section 218 of the Code. If, then, rule 370 was valid and operative undoubtedly there was a proceeding in the present case corresponding to the proceeding by writ of *seize facias* for notice under section 216 of the Code of 1879 which corresponded with notice under section 218 of the Code of 1882, operated in the same manner as a writ of *seize facias*.

Therefore, the order of the 30th June, 1908, made by the Master by itself constituted a review with

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the meaning of article 183 of the 1st Schedule of the Limitation Act, 1908, and revived the decree. See *Beni Madho v. Shiva Narain* (1). Even if the order for transmission were not by itself sufficient to revive the decree, the notice issued calling upon the defendant to show cause was sufficient; and certainly the order for transmission combined with the notice to show cause had the effect of reviving the decree. Orders like the one in the present case were always treated in these and in other Courts as constituting revivors, the Courts in the Madras, the Allahabad and the Bombay Presidencies having always taken the view that such orders amounted to revivor.

Mr. Jackson, in reply. There was no doubt that revivor did not exist in the present case. What has been argued was whether the circumstances brought about a revivor. Reliance was placed on *Srikary Mundul v. Murari Chowdhry* (2), by the learned Advocate-General, but see the decision of the same Judge in *Nilmony Singh Deo v. Biressur Banerjee* (3). Articles 182 and 183 of the Limitation Act of 1908, which were mixed up with each other by the learned Advocate-General, stood on a very different footing to each other. As regards the powers of the Master, he is not a judicial but a ministerial officer. His powers were limited to any non-judicial or quasi-judicial act only. It could not be urged that an order for execution was such an act. He could not decide whether or not a decree was capable of execution. He had no power to issue execution if the defendant appeared and showed cause, nor had he the power to do so in the case of the defendant's non-appearance, as in the present case. The Judge alone had the power to deal with the present case. Any rules framed not in accordance with

(1) (1907) 4 All. L. J. 405.

(2) (1886) I. L. R. 13 Calc. 257.

(3) (1889) I. L. R. 16 Calc. 744.

the Code of Civil Procedure were inoperative and no effect should be given to such rules. *Baijnath v. Ahmed Musaji Saleji* (1). As regards *res judicata*, see *Sreepati Charan Chowdhury v. Shamaldhone Dutt* (2) and *Mungul Pershad Dicit v. Grijal Kant Lahiri Chowdhury* (3). Mere service of notice under s. 248 was not sufficient to debar the defendant from urging *res judicata* when no substantive order for execution had been made after service of notice. Nothing was known as to how rule 370 in Belchambers' Rules and Orders came about. Under the old procedure of *scire facias* something more had to be done than merely applying for the writ. See *Jogendra Chandra Roy v. Shyam Das* (4). Section 248 did not contemplate merely the issue of the notice. Under it the Master had no power to make the order for execution until the order on the application was made by the Judge. The mere application was useless for the purpose of revivor, *Jogendra Chandra Roy v. Shyam Das* (4). There must be first of all a substantive application and then the order on it for execution. The Court to which a decree was transmitted under section 223 of the Code of Civil Procedure, 1882, had the power to issue execution on that decree and to determine the question of limitation. The order for transmission in the present case showed that there was no order for execution. The one case that was relied on by the learned Advocate-General, namely, the case of *Beni Madho v. Shiva Narain* (5), was a wrong decision. The other cases in his favour were glossed over by him. The case of *Khetpal v. Tikam Singh* (6) laid down that

(1) (1912) I. L. R. 40 Calc. 219.

(2) (1910) 15 C. L. J. 123;

15 C. W. N. 661.

(3) (1881) L. R. 8 I. A. 123.

(4) (1909) I. L. R. 36 Calc. 543;

9 C. L. J. 271.

(5) (1907) 4 All. L. J. 405.

(6) (1912) I. L. R. 34 All. 396.

Def. an application for execution could in no sense of the words be regarded as an application in continuation of an application for transfer of a decree from one Court to another. See also the decision in *Sundar Singh v. Doru Shankar* (1), *Umrao Singh v. Lachmi Narain* (2) and *Jeevandas Dhanji v. Ranchoddas Chaturbhuj* (3).

Cur. adv. rul.

SANDERSON C.J. This is an appeal by the defendant against the decision of the learned Judge, by which he refused to set aside an attachment effected at the instance of the plaintiff on the defendant's property 147, Cotton Street, in Calcutta. The question which was referred to the decision of the Full Bench was whether the application of the 1st of June, 1908, and the order of the 30th June, 1908, constituted a revivor within the meaning of article 183 of the first schedule to the Indian Limitation Act, 1908.

The material facts and dates were as follows:

21st May, 1896—The plaintiff obtained a decree in the High Court for the payment of money against the defendant.

2nd September, 1896—An application was made for the transmission of a certified copy of the decree to the Purnea Court.

15th May, 1899—Application for execution by arrest and imprisonment of the defendant was made, the former application having been returned unexecuted.

12th February, 1900—An order on the last mentioned application was made—returnable on the 12th March, 1900.

12th March, 1900—The time was extended for three months.

(1) (1897) I. L. R. 20 All. 78. (2) (1904) I. L. R. 26 All. 361.

(3) (1910) I. L. R. 35 Bom. 103.

1st June, 1908—An application was made in the High Court for the transmission of a copy of the decree to Murshidabad for the attachment of property. 1916
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30th June, 1908—Order for transmission was made. SAIT SUMARI

17th July, 1908—Copy of the decree was transmitted. MELL.
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18th January, 1915—Application was made for execution by attachment of 147, Cotton Street.

10th June, 1915—Order was made for execution.

19th July, 1915—Notice of application by the defendant to set aside the attachment was issued.

2nd August, 1915—The application was heard and refused, and it is from the order of 2nd August, 1915, that the defendant appealed.

The point relied upon in the Court below by the defendant was that the decree of 21st May, 1896, in execution whereof the attachment was made, was barred by the above-mentioned Statute of Limitation. On behalf of the plaintiff it was urged that by reason of the application of 15th May, 1899, and the orders of 12th February, 1900, and 30th June, 1908, the decree was kept alive and was, therefore, enforceable by execution.

The clause which is applicable to this matter is article 383 of the first schedule of Act IX of 1908. The first column describes the application as follows: "To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction, or an order of His Majesty in Council." The second column prescribes the period of Limitation, viz., 12 years. The third column specifies the time from which the period of Limitation begins to run as follows: "When a right to enforce the judgment, decree or order accrues to some person capable of releasing the right."

It is clear that if the matter stopped there the

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decrees would not be enforceable, for it was made on the 21st May, 1896, and the application for execution, which is now material, was not made until the 18th January, 1915. But there is a proviso contained in article 183 which runs as follows: "Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the 12 years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be," and it is in respect of this proviso that the question which has been referred to the Full Bench arises.

It is not denied that the order which was made on the 12th February, 1900, for the execution of the decree by the arrest of the defendant constituted a "revivor" within the meaning of the clause; but it is said on behalf of the defendant that more than 12 years has elapsed since such revivor and that the decree is no longer enforceable. On the other hand, the plaintiffs allege that the application of the 1st June, 1908, and the order of 30th June, 1908, constituted a revivor within the meaning of the clause and consequently that the decree is still capable of being enforced, inasmuch as the application was made on the 18th January, 1915, a date within the period of 12 years, counting such period from June, 1908. It is necessary, therefore, to consider in the first instance what was the nature of the application of the 1st June, 1908, and the proceedings in connection therewith. The particulars of the application are shown by the entry

in the last column of the form on which the application was made as follows :

"By transmission of a certified copy of the said decree together with a certificate of *non-satisfaction* to the Court of the District Judge of Murshidabad within whose jurisdiction the defendant has property and by attachment and sale of which the plaintiffs' claim may be satisfied."

The defendant has no property within the jurisdiction of this Honourable Court whereby the decree can be satisfied."

This was obviously an application for transmission of a copy of the decree under sections 223 and 224 of the Civil Procedure Code of 1882, the Code which was in force at the date of the application. The particulars of the application show that it was intended to bring it within clause (b) of section 223, and the procedure which the Court was asked to make use of was that provided by section 224 of the Act.

The application, however, was made upon a form which was applicable to an application under section 235 of the 1882 Act, which deals with an application for execution and which sets out the particulars which must be included in a tabular form which the applicant or some other person acquainted with the facts must verify.

Upon the application being made, an order was made by the Registrar that notice under section 248 should issue. Notice was, thereupon, served upon the defendant calling upon him to show cause why the decree should not be executed against him.

On the 30th June, 1908, the following order was made by the Registrar: "Upon reading the notice and the affidavit of service no cause being shown, let execution issue as prayed," and in consequence of

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1916 this order a copy of the decree with a certificate of
Certified: non-satisfaction was transmitted to the Murbidabad
Sivas Court.

Suit Serial: It was argued first that the order was in itself
No. 1. a "revivor" within the meaning of article 183 of the
Sivas schedule of the Limitation Act
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The test of what constitutes such a "revivor" is in my judgment correctly laid down by Mookerjee J. in *Kamini Debi v. Aghore Nath Mukherji* (¹) as follows: "The essence of the matter is that to constitute a revivor of the decree there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it," and I think it must necessarily be implied that such determination must be by a Court or person duly qualified to make it.

The question, therefore, arises whether by the abovementioned order there was such an express or implied determination in this case. In my judgment the substance and not the form of the matter must be looked at and considered from that point of view the application was for the transmission of a certified copy of the decree together with a certificate of non-satisfaction and no more, and the order made in substance was that the application should be granted. The actual words of the order were "Let execution issue as prayed." These words necessitate a reference to the application which, as already stated, was not an application for execution, but for the transmission of a certified copy of the decree. It was said during the argument that the application had to be made on the form abovementioned, as there was no other form provided. To my mind the use of a particular form cannot affect the matter when once it is established that the application was not for execution.

but merely for transmission of a copy of the decree. 1916
 All that happened in reality was an application to the CHUTTERPUT
 Registrar for transmission of the copy of the decree, SINGH
 a direction by him that notice of such application SAIT SEMARI
 should be given to the judgment-debtor, and on his MULL
 non-appearance an order that the copy of the decree SANDESON
 should be transmitted in accordance with the applica- C.J.
 tion. Under these circumstances, in my judgment,
 there was no determination that the decree was still
 capable of execution, and the order of the 30th June,
 1908, did not constitute a revivor within the meaning
 of clause 183.

It was further argued, however, that the notice issued under the directions of the Registrar and the order of 30th June, 1908, taken together constituted a "revivor." It was urged that the notice to show cause was contemplated by article 183 as a revivor in the same way as under article 182, and that such notice and order had the same effect as the procedure of *scire facias*.

It is true that the direction given by the Registrar was that notice under section 248 should issue, and it has also been held that the procedure embodied in sections 248 and 249 is analogous to the procedure of *scire facias* and that such procedure when properly and rightly used would constitute a revivor. See *Jogendra Chandra Roy v. Shyam Das* (1), but in my judgment sections 248 and 249 were not applicable to the matter in question. These sections deal with an application for the execution of a decree and provide for notice being given to the party against whom execution is applied for, and if he does not appear, or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

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They have no relation, in my opinion, to an application for the transmission of a copy of the decree under section 223 which may be ordered according to the words of the section "on the application of the decree-holder." The notice, therefore, which was issued under section 248 was inapplicable to the proceedings in question. But it was urged by the learned Advocate-General that if the Court has in fact sent notice to the debtor and has in fact adjudicated upon the matter, something has been done to show that the decree is capable of execution.

I think it would be unreasonable so to hold when, having regard to the facts of the case, it is plain that the Registrar did not adjudicate upon the question whether the decree was capable of execution, but merely ordered a copy of the decree to be transmitted to the Murshidabad Court, with a certificate of non-satisfaction. Further, even assuming that the notice was rightly sent and in accordance with the provisions of the Act by the Registrar, it should be pointed out that the Registrar would have no jurisdiction to adjudicate upon any matter such as Limitation, with reference to the question whether the decree was capable of execution. Such a question would, in my judgment, have to be determined by the Court itself under section 249 of the Civil Procedure Code.

It is true that by section 637 of the Civil Procedure Code any *non-judicial* or *quasi-judicial* act which the Code requires to be done by a Judge may be done by the Registrar, and the Court may by rule declare what shall be deemed to be *non-judicial* or *quasi-judicial* acts within the meaning of the section. Rule 515 A, which came into force on 1st September, 1905, provided that certain applications therein specified should be made to the Registrar or Master, and that all acts done by the Registrar or Master under this rule

should be deemed to be *quasi-judicial*. No. 30 under 1916
 the said rule refers to applications for order for CRUTTEREDT
 execution of a decree or order for arrest, attachment, SINGH
 sale or otherwise, with power to order issue of notice v.
 under section 218 of the Code of Civil Procedure, SUIT SUMARI
 where such notice is necessary. But it is clear that MULL
 the Registrar was not thereby clothed with authority
 to decide such a question as arises in this case, viz.,
 whether the decree was barred by the Statute of
 Limitation.

It was argued, however, that rule 370 of the Rules then in force, which are set out in Mr. Belchambers' book, showed that it was incumbent upon the Registrar to issue the notice. This rule came into force on the 1st April, 1878, judging from the note attached to rule 345 in Mr. Belchambers' book and, therefore, before the 1882 Code. It may or may not have been consistent with the Code which was in force at the date when it was passed, but in my judgment it was not consistent with the scheme of the Code of 1882. Under that Act the application for transmission of the copy of the decree to another Court under section 223 was a procedure under which the question whether the decree was capable of execution was intended to be left to the Court to which the copy of the decree was transmitted : a procedure different in its essential from the procedure provided for an application for execution dealt with in subsequent sections of the Act. In any event I think it is safe to say that these rules must be read as modified by the Civil Procedure Code of 1882 under which the application in this case was made, and in my judgment the notice issued and order made under the abovementioned circumstances did not operate as a revivor within the meaning of article 183 of the Limitation Act, Schedule I.

It is necessary to notice a further argument by

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the learned Advocate-General, viz., that with regard to a decree on the original side the word "revivor" in article 183 means the same thing as one or more of the matters which are mentioned in article 182, sub-clauses 5 and 6.

With this I cannot agree. I think the fact that the word "revivor" is used in article 183, instead of the different matters specified in article 182 being set out again or referred to in article 183 as might have been done, shows that something different to such matters was intended. Further, the conditions dealt with by the two clauses are essentially different and the periods of limitation vary materially.

For the abovementioned reasons, in my judgment, the answer to the question referred to us should be that the application of the 1st June and the order of the 30th June do not constitute a revivor within article 183. The result will be that the appeal will be allowed, that the order of the learned Judge will be set aside, and that the attachment effected on the property of the defendant, viz., 147, Cotton Street, will also be set aside. The defendant will have the costs of the application in the Court below and of this appeal.

WOODROFFE J. The Advocate-General accepts the definition of the revivor as a decision holding that the decree is still capable of execution. He admits that an application for transmission of decree is not a revivor. It is further conceded that even an order for transmission might be regarded as a ministerial act and not as a revivor. In my opinion, an order for transmission as such is not an order on an application for execution, though it is an order on an application in execution. It is a proceeding taken with a view to further action by way of execution elsewhere

on which action, unless previously determined, the question of the right to execute the decree is decided. It is, however, argued that in the present case there was something more, viz., the issue of a notice under section 248 and an order for issue of execution. According to the Code a notice under section 248 does not issue on an application for transmission under section 223. But assuming that this was done under rule 370 of the old rules, the question arises whether that rule which would seem to have been passed under the Act of 1859 was of force under the Code of 1882. But even if it was, this does not assist the creditor. For if the Registrar had power to issue as a "*quasi-judicial act*" notice under 248, he had no power to determine judicially that the decree was alive had the debtor contested the point. The Judge must have done that, and the fact that the debtor did not appear on the notice cannot give the order passed that judicial character which is necessary for an order operating as revivor. It is to be observed that the order passed was "let execution issue as prayed." The last two words make the order operative as one for transmission of the decree, for this was what was asked. In any case it cannot be said that the Registrar either could or did decide that the decree was capable of execution. The proceedings taken did not, in my opinion, operate as a revivor within the meaning of article 183 of the Limitation Act. The decree was transmitted to Murshidabad, and, so far as appears from the proceedings before us, nothing was done on the order and nothing was attempted to be done in execution until nearly seven years later. I would, therefore, answer the question referred to us in the negative and I agree in the order passed.

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ation of the question of law referred to the Full Bench for decision are not set out in the order of reference, and may be briefly recited here.

On the 21st May, 1896, the respondents obtained an *ex parte* decree for money against the appellant on the Original Side of this Court. After intermediate proceedings, which need not be described in detail at this stage, the decree-holders, on the 18th January, 1915, made the present application for execution of the decree by attachment of premises 147, Cotton Street, in this city. The judgment-debtor objected that the application was barred by limitation under article 183 of the schedule to the Indian Limitation Act, 1908, which was in force at the date of the application and governed it, on the principle that the law of limitation applicable to a proceeding is, unless there is a distinct provision to the contrary, the law in force at the date of the institution of the proceeding, *Soni Ram v. Kanhaiya Lal*(1). The objection was overruled by Mr. Justice Chaudhuri on the 2nd August, 1915, and the propriety of this decision is in question before us.

It is plain that the application for execution is *prima facie* barred under article 183, which requires an application to enforce a decree of a Court established by Royal Charter in the exercise of its Ordinary Original Civil Jurisdiction to be made within twelve years from the date when a present right to enforce the decree accrues to some person capable of releasing the right. As the application for execution, with which we are here concerned, was made on the 18th January, 1915, in respect of a decree dated the 21st May, 1896, the decree-holders seek to escape the bar of limitation by reliance upon that portion of the proviso to article 183, which lays down that when the decree has been revived, the prescribed period of

(1) (1913) I. L. R. 35 All. 227; I. L. R. 49 I. A. 74; 17 C. I. J. 432.

twelve years shall be computed from the date of such revivor. It is thus incumbent upon the decree-holders to establish that the decree was revived within twelve years from the 21st May, 1896, and that since the date of such revivor, twelve years had not elapsed on the 18th January, 1915. To substantiate this position, they rely on an application made by them on the 1st June, 1908, and the order passed thereupon on the 30th June, 1908; the combined effect of the application and the order was, it is argued, to revive the decree within the meaning of the proviso to article 183. This view is supported by the decision in *Suja Hossem v. Monohur Das* (1), though a contrary view had been accepted when that case was heard in the first instance, *Suja Hossem v. Monohur Das* (2). The contention of the decree-holders also receives some support from the decisions in *Umrao Singh v. Lachmi Naram* (3) and *Beni Madho v. Shiva Narain* (4). The correctness of these decisions has, however, been impugned before us on behalf of the judgment-debtor.

There is no definition of the term "revivor" in the Indian Limitation Acts of 1859, 1871, 1877 and 1908. But the historical review contained in the judgments in the cases of *Ashootosh Dutt v. Doorga Churn Chatterjee* (5), *Futteh Narain Chowdhury v. Chundrabati Chowdhryain* (6) and *Jogendra Chandra Roy v. Shyam Das* (7) shows beyond doubt that the procedure for revivor of judgement on the Original Side of this Court was substantially analogous to the writ of *scire facias* under the Common Law (rule 195 of the Rules of 1851 on the plea side of the Supreme

(1) (1896) 1 I. L. R. 24 Calc. 244

(5) (1880) 1 I. L. R. 6 Calc. 504

(2) (1895) 1 I. L. R. 21 Calc. 921

(6) (1892) 1 I. L. R. 20 Cal. 551

(3) (1904) 1 I. L. R. 26 All. 361.

(7) (1899) 1 I. L. R. 35 Calc. 543

(4) (1907) 4 All. L. J. 405

9 C. L. J. 273

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Mull. ation of the question of law referred to the Full Bench for decision are not set out in the order of reference, and may be briefly recited here.

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twelve years shall be computed from the date of such revivor. It is thus incumbent upon the decree-holders to establish that the decree was revived within twelve years from the 21st May, 1896, and that since the date of such revivor, twelve years had not elapsed on the 18th January, 1915. To substantiate this position, they rely on an application made by them on the 1st June, 1908, and the order passed thereupon on the 30th June, 1908; the combined effect of the application and the order was, it is argued, to revive the decree within the meaning of the proviso to article 183. This view is supported by the decision in *Suja Hossein v. Monohur Das* (1), though a contrary view had been accepted when that case was heard in the first instance, *Suja Hossein v. Monohur Das* (2). The contention of the decree-holders also receives some support from the decisions in *Umrao Singh v. Lachmi Naram* (3) and *Beni Madho v. Shiva Narain* (4). The correctness of these decisions has, however, been impugned before us on behalf of the judgment-debtor.

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(1) (1896) I.L.R. 24 Calc. 244.

(5) (1880) I.L.R. 6 Calc. 504.

(2) (1895) I.L.R. 22 Calc. 921.

(6) (1892) I.L.R. 20 Calc. 551.

(3) (1904) I.L.R. 26 All. 361.

(7) (1909) I.L.R. 35 Calc. 543.

(4) (1907) 4 All. L.J. 405.

9 C.L.J. 271.

1916 Court). That procedure was subsequently embodied
CHUTTERPUR in sections 248 and 249 of the Civil Procedure Code of
SINGH 1882 and later on reproduced as Order XXI, rules 22 and
SUIT SAVARI 23 of the Code of 1908. Under these provisions, where
MULL an application for execution is made, a notice is
MOOKERJEE required to issue to the person against whom execu-
J. tion is applied for, if more than one year has elapsed
from the date of the decree. The notice calls upon
him to show cause why the decree should not be
executed against him. If he does not appear or does
not show cause to the satisfaction of the Court, the
Court orders the decree to be executed. The order
for execution thus made operates as a revivor, but the
mere issue of the notice does not by itself produce
that consequence, *Monohar Das v. Futtah Chand* (1).
This fully justifies the rule enunciated in *Kamini
Debi v. Aghore Nath Mukherji* (2), namely, that to
constitute a revivor of a decree there must be,
expressly or by implication, a determination that
the decree is still capable of execution and the
decree-holder is entitled to enforce it. It is of vital
importance to add that such determination must be
made with jurisdiction and by a competent tribunal.
Tested in the light of this principle, what is the true
position of the decree-holders in the case before us?
On the 1st June, 1908, they applied for transmission of
the decree from the Original side of this Court to the
district of Murshidabad, on the allegation that the
judgment-debtor had no property within the local
limits of the ordinary Original Jurisdiction of this
Court, while he had property within the jurisdiction
of the other Court. The application, though made
obviously under section 223, clause (b) of the Code of
1882, was described as one under section 235 for
execution of the decree; this was indisputably mis-

(1) (1909) I. L. R. 30 Cal. 979

(2) (1909) 9 C. I. J. 91.

leading, and if we look to the substance of the matter as we must do, we cannot attribute to the application a character it did not really possess; what is essential in matters of this description is the substance and not the mere form. The Master recorded the following order on the application on the 1st June, 1908: "Let notice issue under section 248 (a)." This clearly was not in conformity with the Code which contemplates the issue of a notice under section 248 on the basis of, not an application for transfer of a decree under section 223, but an actual application for execution under section 235. The scheme of the Code in this respect will be found fully analysed in the case of *Sreepati Charan Chowdhury v. Shamaldhone Dutt* (1) and need not be reproduced here. The substance of the position is that the group of sections (A) from 223 to 229B in Chapter XIX deal with the Courts by which decrees may be executed, while the group of sections (B) from 230 to 238 deal with applications for execution. These sections indicate that an application for transfer of a decree is in no sense an application for execution, *Nilmony Singh Deo v. Biressur Banerjee* (2), *Chatterput Singh v. Daya Chand Marwari* (3), *Khetpal v. Tikam Singh* (4) which dissent from *Ram Sahai v. Nanni* (5). It is not necessary for us to consider whether, as indicated in *Bhabani Charan Dutt v. Pratap Chandra Ghosh* (6), an application for transmission of a decree may not be deemed an application to take a step in aid of execution, nor is it necessary to discuss whether, as indicated in *Husein Ahmad Kaka v. Saju Mahammad Sahid* (7), a Court may not decide the question

(1) (1910) 15 C. L. J. 123.

15 C. W. N. 661

(2) (1889) I. L. R. 16 Calc. 744

(3) (1911) 23 C. L. J. 641.

(4) (1912) I. L. R. 34 All 396.

(5) (1886) All W. N. 137

(6) (1904) 8 C. W. N. 575

(7) (1890) I. L. R. 15 Bom 23

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of limitation even before transmission of the decree, or whether, as ruled in *Srihary Mundul v. Murari Chowdhry* (1), even after transmission the Original Court may not, under section 239 of the Code of 1882, decide the question of limitation when execution had been stayed in the Court to which the decree has been transferred. For the purposes of the present case, it is sufficient to hold that section 230 makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution, while the explanation to section 248 shows that the notice required by that section must, where the decree has been transmitted, be issued by the Court to which the decree has been sent for execution. Consequently, the issue of the notice in this case under section 248, on the basis of the application for transmission of the decree, was not in conformity with the Code of 1882 which was in force at the time. It is said, however, that the action taken by the Master was in accord with the rules framed by the Court when the Code of 1859 was in force, *Raja Sreenath Roy v. Romesh Chandra Acharyya Chaudhuri* (2). It is needless to investigate whether the rules, when first framed, were consistent with the Code of 1859, for, even if they were, it is plain that after 1882 they could be deemed operative only in so far as they were consistent with the Code of 1882, *Baijnath v. Ahmed Musaji Saleji* (3). It is significant that the rules framed after the Code of 1908 have been made consistent with that Code, and a notice under Order XXI. rule 22, is no longer required to be issued upon an application for transmission under section 39. We next pass on to the order made by the Master on the 30th June, 1908, on return of

(1) (1886) I. L. R. 13 Calc. 257. (2) (1908) 12 C. W. N. 897.

(3) (1912) I. L. R. 40 Calc. 219.

affidavit of service of the notice under section 248: 1916
 "Upon reading the notice and the affidavit of service,
 no cause being shown, let execution issue as prayed." CHUTTERPUR
 The language of the concluding portion of this order SAIT SUMARD
 is significant; what was prayed was transmission of MULL
 the decree, and what was actually done pursuant to MOOKERJEE
 this order of the Master was not the issue of any J.
 process of execution, but only a transmission of the decree on the 17th July, 1908. Here again if we look to the substance of the matter, as we must do, we find that there was in reality no determination by the Master that the decree was still capable of execution. It is further plain that the Master had no authority to make such a determination, for section 249 requires that the Court should consider the objection, if any, and determine whether the decree should or should not be executed. This is clearly a judicial act which cannot be delegated to a Master under section 637 of the Code of 1882, and it is worthy of note that although rule 515 (A) invests the Master with power to order issue of a notice under section 248, it does not authorise him to give a decision under section 249. It is, I think, incontestable that there was not in this case an order under section 249 by the Master, and, that, if there was, the order must be treated as made without jurisdiction. My conclusion consequently is that upon the application for transmission of the decree under section 223 a notice under section 248 could not properly be issued, that such notice, though issued, did not by itself operate as revivor of the decree, and that there was not in fact and could not in law be such a determination by the Master under section 249 as would operate to revive the decree.

It is not necessary to examine in detail the contention that article 183 should be construed in the light of article 182, and that whatever is sufficient to keep

1916 alive a decree for the purposes of article 182 should
CHATTERJEE be deemed sufficient for the purposes of article 183.
SINGH There is, in my opinion, no basis whatever for this
v. contention; the scheme and scope of the two articles
SAIT SUMARI are radically distinct and no useful purpose would
MULL. be served by an endeavour to amalgamate them or to
MOKERIEE interpret one by reference to the other.
J.

On these grounds, I agree that this appeal must be allowed with costs throughout, the order of Chaudhuri J. set aside and the attachment cancelled.

CHITTY J. I agree for the reasons given by the learned Chief Justice that the question referred to us should be answered in the negative. I have nothing further to add.

N. R. CHATTERJEA J. I am also of the same opinion.

Appeal allowed.

Attorneys for the appellant: *S. D. Dutt & Ghose.*
 Attorneys for the respondents: *O. C. Ganguly & Co.*
 O. M.

ORIGINAL CIVIL.

Before Chaudhuri J.

1916
Jan. 10.

BHUPENDRA NATH BHOSE

v.

E. D. SASSOON & CO.*

Attorney's Lien for Costs—Practice—Set-off—Attaching creditors.

Where on an application by the defendants that satisfaction of a decree obtained against them by the plaintiff should be entered by setting-off a decree upon an award in their favour against the plaintiff, it appeared that a prohibitory order had been made against the plaintiff in execution of a

* Application in Original Civil Suit No. 1339 of 1911

decree obtained by a third party, and the attorney for the plaintiff claimed a lien for costs on such decree :—

Held, that the defendants' application to set-off was proper, but that this was not a case in which the Court ought to hold that the solicitor's lien intercepts the set-off claimed.

Edwards v. Hope (1), *Blakey v. Latham* (2), *Nizab Nazim of Bengal v. Heera Lall Seal* (3), *Supramanyar Setty v. Harry Frobby Mug* (4), *Cullanjee Sangjithoy v. Raghavjee Vijpal* (5) and *Goodfellow v. Gray* (6) referred to.

THIS was an application by Babu Rasik Lal Mullick, Attorney for the plaintiff in the above suit.

The plaintiff in the above suit had obtained a decree against the defendants on the 10th August, 1915 for Rs. 1,431-8-0, but prior to this decree the defendants had obtained an award on the 30th April, 1915 against the plaintiff in this suit for Rs. 1,451-9 which included costs Rs. 133. On the 24th August, 1915, the defendants applied that satisfaction of the plaintiff's decree might be entered. Before the hearing of the application was disposed of, it appeared that a prohibitory order had been issued against the plaintiff in execution of a decree which had been obtained against him by Messrs. Christie and Ide; while the plaintiff's attorney claimed that he had a lien for his costs.

The application of the defendants was therefore directed to stand over for notice to Messrs. Christie and Ide and another creditor. When the matter came up the Court held that Messrs. Christie and Ide and the other creditor were entitled to a *pro rata* distribution of the amount of the decree in favour of the defendants, Messrs. E. D. Sassoon & Co., but the order was made subject to any application that might be made by the attorney in respect of his claim to a lien for his costs.

(1) (1885) 14 Q. B. D. 922

(2) (1889) 41 Ch. D. 518.

(3) (1873) 10 B. L. R. 444.

(4) (1887) I. L. R. 14 Calc. 374

(5) (1904) 6 Bom. L. R. 873.

(6) [1899] 2 Q. B. 498.

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Mr. N. N. Ghatak, for the attorney Babu Rassik Lal Mullick. The attorney has a lien on the decree for his costs; and the set-off should only be allowed subject to the attorney's lien, and this lien is enforceable against the attaching creditors. He referred to the following cases: *Collett v. Preston* (1), *Re Adams, ex parte Griffin* (2), *Edwards v. Hope* (3), *Blakey v. Latham* (4), *Nawab Nazim of Bengal v. Heera Lall Seal* (5), *Supramanyam Setty v. Hurry Firoo Mug* (6), and *Cullianjee Sangjibhoy v. Raghunjee Vijpal* (7).

Mr. A. A. Avetoom, for Messrs. E. D. Sassoon & Co., the defendants, contended that it would obviously be unfair that the defendants' claim to set-off should be intercepted by the attorney's lien on the decree for his costs. He relied on *Pringle v. Gloag* (8) and *Goodfellow v. Gray* (9).

CHAUDHURI J. This is an application on behalf of the plaintiffs' attorney that he has a lien on the judgment obtained by the plaintiffs against the defendants and that his lien has priority over all other claims. It appears that prior to the decree in this suit the defendants had obtained judgment upon an award in their favour dated the 19th March, 1915. The award was filed on the 30th April, 1915 and became capable of immediate execution. By that decree the defendants were allowed Rs. 1,451-9 which included costs to the extent of Rs. 133 against the present plaintiffs. Subsequently, the plaintiffs obtained a decree against Sassoon & Co., namely, on the 10th August, 1915, for Rs. 1,431-8. On the 24th August, Sassoon & Co. applied

(1) (1852) 15 Beav. 458.

(2) (1880) 14 Ch. D. 37.

(3) (1885) 14 Q. B. D. 922.

(4) (1889) 41 Ch. D. 518.

(5) (1873) 10 B. L. R. 444.

(6) (1867) I. L. R. 14 Calc. 374.

(7) (1904) 6 Bom. L. R. 879.

(8) (1879) 1 Ch. D. 676.

(9) [1899] 2 Q. B. 498.

on a tabular statement that satisfaction of the plaintiffs' decree might be entered. Woodroffe J., held that it was a proper application, but inasmuch as it appeared that a prohibitory order had been issued against the plaintiffs in execution of a decree which had been obtained against them by a firm named Christie and Ide in Suit No. 2 of 1913 for a large sum of money, he directed the matter to stand over for notice of the application to them. The matter came up before me, and I held that Christie and Ide and David Sassoon & Co. were entitled to *pro rata* distribution of the amount of the decree in favour of Sassoon & Co. At that time learned counsel for the attorney for the plaintiffs submitted that he had a lien for costs, and I made my order subject to any application that might be made by the attorney in respect of his claim. That application has now been made.

Reliance has been placed on behalf of the attorney on the case of *Edwards v. Hope* (1). That is a case on the English Order LXV, r. 14, which deals with "allowing a set-off for costs notwithstanding the solicitor's lien for costs in the particular cause or matter, in which the set-off is claimed." The rule was held applicable to costs in the same cause, not in different actions, and that in the equities of that particular case the balance was in favour of allowing the solicitor's lien". . . *Edwards v. Hope* (1) has been followed in *Blakey v. Latham* (2). Kay J., while feeling bound by the decision in *Edwards v. Hope* (1), expressed his opinion that the equity claimed on behalf of the attorney was the most extraordinary equity he had ever heard of. In England the practice was different in different Courts, and conflicting. In the Common Pleas a set-off was allowed without reference to the lien, but not in the Court of Chancery. It seems to

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me that we are not bound to follow *Edwards v. Hope* (1), as we have no such rule here, and unless I am convinced that the equity on behalf of the attorney is such that it ought to be allowed against the defendants in this action. In this case the defendants had obtained a decree prior to the decree obtained by the plaintiffs. I do not think that it has ever been recognised that a solicitor has higher rights than his own client, and it has always been held that the lien is subject to all the equities between the client and the other parties interested in the property. In considering *Blakey v. Latham* (2), Kay J. says that there is no such thing as lien except upon something of which you have possession, and that although one speaks of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the Court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs. He did not think it was reasonable to hold that the solicitor had an equity against the defendant compelling him to pay instead of setting it off. No case in India has been cited to me which supports the attorney's claim in this suit.

Nawab Nazim v. Heera Lall Seal (3) merely holds that the attorney has a lien against an attaching creditor. In *Supramanyan Setty v. Hurry Froo Mug* (4), it was held that an attorney's lien for costs had priority over the attaching creditor. *Cullianjee Sangjibhoy v. Raghunjee Vijpal* (5) was referred to; it simply holds that the Conrt has summary jurisdiction over its suitors in the matter of attorney's lien. The same also has been held in this Court, but that

(1) (1885) 14 Q. B. D. 922.

(3) (1873) 10 B. L. R. 444.

(2) (1889) 41 Ch. D. 518.

(4) (1887) I. L. R. 14 Calc. 374.

(5) (1904) 6 Bom. L. R. 879.

such lien intercepts the right to a set-off has not, so far as I know, been directly held. Order XXI, r. 18, provides for set-off being allowed in cases of execution under cross-decrees. In *Goodfellow v. Gray* (1), it was held that the rule of set-off applied to damages in different actions, notwithstanding a charging order in respect of solicitor's costs in one of these actions. It is also to be noticed that *Edwards v. Hope* (2) dealt with the question of set-off of costs under the rule.

The attorney, it is to be noticed, merely states that he has been unable to get the balance of his costs from the plaintiffs notwithstanding demands, and that the plaintiffs have closed their place of business and were and are residing outside the jurisdiction of this Court. The attorney does not say that there is no chance of recovering his costs from his clients and that this is the only property out of which his claim can be satisfied. It does not appear also that he has taxed his bill of costs. I agree with Woodroffe J. when he held that the defendants' application to set-off the costs was proper, and I hold that this is not a case in which I ought to hold that the solicitor's lien intercepts the set-off claimed. The application will therefore be refused with costs.

W. M. C.

Application refused.

(1) [1899] 2 Q. B. 493.

(2) (1885) 14 Q. B. D. 922

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APPELLATE CIVIL.

Before Holmeood and Imam JJ.

1916

UZIR ALI SARDAR

Jan. 25.

v.

SAVAI BEHARA.*

Remand—Remand after addition of parties by Appellate Court—Amendment of plaint—Whether whole case remanded in consequence—Civil Procedure Code (Act V of 1908) s. 107, O. XLI, rr. 23, 25.

There are other possible cases of remand which are not included in O. XLI.

Nabin Chandra Tripati v. Prankrishna De (1) distinguished

In the Code of Civil Procedure, 1908, the Legislature has given the power of amendment to the Court of Appeal and, as a necessary outcome, it has the power of remanding the whole case when an amendment of plaint is granted and when parties are added.

The general provision in s. 107 for a remand is not governed or limited by O. XLI alone, but is subject to such conditions and limitations as may be prescribed in the rules and orders, the amendment of a plaint and addition of parties in a Court of appeal being among them.

SECOND appeal by Miah Uzir Ali Sardar, the plaintiff.

The plaintiff brought this suit in the Court of the Subordinate Judge of Jessore to eject the defendants from 19 plots of land measuring 39 bighas and 14 cottas situated in manza Solemanpur, alleging that he had come into exclusive possession by partition. The land had been granted to the predecessors-in-

* Appeal from Appellate Order No. 358 of 1912 against the order of G. S. Dutt, Additional District Judge of Jessore, dated April 15, 1912, reversing the order of Tarak Nath Dutt, Subordinate Judge of Jessore, dated May 31, 1911.

interest of the defendants as service-tenure for bearing *palkies*, but they had refused to perform the service when called upon by the plaintiff. The defendants admitted that the land had been originally granted as service-tenure, but contended that the proprietors subsequently resumed the service-tenure and re-settled the land with their predecessors-in-interest as *jamai* land giving them a transferable right, and they accordingly sold their *jamai* tenancy to one Mr. McLeod and then took settlement from him as his under-*raiyat*. The learned Subordinate Judge decreed the suit holding that the fact of resumption had not been proved by the defendants. On appeal, the Additional District Judge of Jessore reversed that decree and remanded the whole case for production of certain documents after adding necessary parties including Mr. McLeod.

Babu Mahendra Nath Roy (with him *Babu Amarendra Nath Bose*), for the appellant. I submit that O. XIII, r. 1 of the Code of Civil Procedure for the production of papers is imperative. It is not a transferable holding and it has come to an end. The Privy Council decisions are in my favour. The Court had jurisdiction to add certain parties for the proper adjudication of the question in issue, but he directs us to make them parties.

[IMAM J. He says in one place—let Gobardhone be made a party.]

Whatever affects the merits of the case prejudices me. Reads O. XLI, rr. 23 and 25. This is not a decision on a preliminary point, and the remand of the whole case is bad in law. *Nabin Chandra Tripathi v. Prankrishna De* (1).

[HOLMWOOD J. I have lately differed from that

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decision. A remand after amendment of plaint in appeal under section 107 of the new Code of Civil Procedure entails *de novo* trial by the first Court, for the newly-added defendants can claim the right to file a written statement and adduce evidence.]

This irregular-remand order does affect the merits of the case.

Mr. H. D. Bose, Babu Sira Prasanna Bhattacharji and *Babu Tarakeswar Pal Chowdhury*, for the respondent, were not called upon.

HOLMWOOD AND IMAM JJ. This is an appeal from an order remanding a case on appeal. The plaint was filed so long ago as the 13th May, 1910. The judgment of the Subordinate Judge in the Court of first instance is dated the 31st May, 1911 and the judgment now under appeal before us is dated the 15th April, 1912. We are now at the end of January, 1916. It is in our opinion very lamentable that this matter should be still undecided, more especially as, for the reasons which we are about to give, there does not appear to have been any substance in the appeal.

It is contended, first, that inasmuch as the Court of first instance did not decide the case upon a preliminary point the order of remand ought to have been made under Order XLII, rule 25, and that the Appellate Court should have kept the case on its own file. In this connection it is conceded that the irregularity cannot be given effect to, unless the appellant was prejudiced by the procedure adopted; and in order to establish that he was so prejudiced, it is pointed out that two orders, which are alleged to be erroneous in law, were passed incidentally by the lower Appellate Court. The first was that three documents were admitted which had been rejected by the first Court as out of time, and the second was that the Judge has

directed the plaintiff to add three persons as defendants before proceeding with the case.

Now, curiously enough neither of these points has any substance in it. It is clearly found by the learned Judge in the Court of Appeal below that the documents were not out of time, and his finding of fact entirely disposes of the question and shows that the Subordinate Judge very improperly rejected these papers on one excuse on the 25th April, 1911, and on another and wholly different excuse on the 26th April, when a second attempt was made to file them. We need not go into details which are fully set out in the judgment of the lower Appellate Court.

As regards the second point, we do not think that a somewhat confused sentence in the penultimate paragraph of the judgment was intended to mean that the burden of adding these defendants should be thrown upon the plaintiff. In another passage in the judgment the Judge clearly directed that they should be added and the case should proceed. We are clearly of opinion that Mr. McLeod was a necessary party. It is contended before us that the alleged landlord set up by the persons whom the plaintiff seeks to eject need not be made a party to the suit, and certain judgments of the Judicial Committee are relied upon in which it is held that it is not necessary for the plaintiff in a suit for ejection to make any one a party who is not in possession, merely because the defendant sets him up as his landlord. But these cases can easily be distinguished from the present case where it is found as a fact that there was a transfer of the tenancy right from the defendants to Mr. McLeod and as a fact that Mr. McLeod was rightly or wrongly admitted to the defendants' possession as tenants and that the defendants are holding under him as sub-tenants by paying him rent. Under the circumstances

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it is clearly not only necessary but to the interest of the plaintiff to get rid of Mr. McLeod.

As regards the other two persons Gobardhan and Indu, whom the defendants put forward as their co-sharers, the adding of co-sharers as parties when a retrial is necessary is a matter of discretion with the Court, and it is certainly to the interests of the plaintiff as well as to the interest of every one else that there should be some finality in this litigation and that all the co-sharers should be added.

This brings us to a reconsideration of the very first objection that the remand was incompetent in the form in which it is made. With all respect for the decision of the learned Judges in the case of *Nabin Chandra Tripati v. Prantrishna De*(1), it may be pointed out that that decision differs from several previous cases by which we are bound, and as the learned Judges declined to refer the question to a Full Bench, because they were of opinion that it did not directly arise, the case being disposed of on another ground, it is not therefore an authority for the very general proposition that there is no other possible case of remand which is not included in Order XLI. Now, this very matter of amendment of a plaint in an Appellate Court with necessary addition of parties is on the face of it a case which cannot possibly fall under Order XLI, rule 23 or rule 25. It is not a decision on a preliminary point, therefore it may be said that the whole case cannot be remanded; but it is not a case in which certain issues can be framed and certain additional evidence can be taken under rule 25, for new parties having been added and the plaint having been amended, the added defendants as well as the original defendant have a right to file fresh written statements and to have the whole case

re-opened. It seems to have been overlooked that in the new Code of Civil Procedure the Legislature has given this power of amendment to the Court of Appeal; and it is a necessary outcome of that power that the Court must have the power of remanding the whole case when an amendment of plaint is granted in appeal and when parties are added. There is a general provision in section 107 of the Code of Civil Procedure for a remand. The consideration which we have just pointed out must lead to the conclusion that that section is not governed or limited by Order XLI alone, but it is subject to such conditions and limitations as may be prescribed in the rules and orders; and the amendment of a plaint and addition of parties in a Court of Appeal is one of the conditions prescribed in the rules and orders. Section 107, therefore, is just as much subject to that condition as it is to the conditions laid down in Order XLI.

We therefore hold, *first*, that this remand was not improperly made; *secondly*, that if it had been irregularly made, it did not prejudice anybody; *thirdly*, that the District Judge would have been grossly wanting in his duty had he not admitted those three documents; and *lastly* that Mr. McLeod is a necessary party and that the Judge exercised a wise discretion in adding the alleged co-sharers Gobardhan and Indu. The result is that appeal is dismissed with costs.

G. S.

Appeal dismissed.

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G. S.

Appeal dismissed.

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C. M. ATT.
S. N. D.
S. S. A.
B. R. B.
R. B. R.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J., Woodroffe and Mookerjee JJ.

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Jan. 19.

GANGADHAR BOGLA

v.

HIRA LAL BOGLA.*

Hindu Law—Stridhan—Mitakshara Succession—Adoption—Rights of adopted son—Competition between adopted son and natural son of co-wives—Sapindas—Co-wife's natural son, if "son"—Text, construction of—Mitakshara, Ch. II, c. XI, paras. 9, 11, 25—"Without issue," meaning of—Manu, Ch. IX, verse 183—Yajnavalkya, Ch. II, vers's 117, 145.

S, a Hindu governed by the Mitakshara School of Hindu Law, married four wives in succession. In conjunction with his first wife, by whom he had no issue, he adopted a son H. By his second wife, S had a son G born to him. S predeceased his fourth wife M, having had no issue by her. M died intestate. On a suit brought by H :—

Held, that both H and G were entitled to succeed to M's stridhan property as *sapindas* of S, and in the absence of any express text curtailing the rights of the adopted son in the circumstances of the present case, H was entitled to share equally with G on the general principle that the adopted son occupies the same position as a natural son and his rights are in every respect similar to those of a natural son.

Joykishore Chaudhury v. Panchoo Baboo (1), *Padmalumari Debi v. Court of Wards* (2) followed.

Nagindas Bhagneandas v. Buchoo Hurkissendas (3; referred to).

The expression "without issue" in Mitakshara, Chap II, section XI, para. 9, must be construed in its ordinary sense, and M must be deemed to have died "without issue."

Quere: Whether Manu, Chap. IX, verse 183, has any reference to questions of inheritance.

Annapurni Nachiar v. Forbes (4) *Bhimacharya v. Ramacharya* (5) referred to.

* Appeal from Original Civil, No. 18 of 1915, in suit No. 755 of 1910.

(1) (1879) 4 C. L. R. 302.

(3) (1915) I. L. R. 40 Bom. 270.

(2) (1881) I. L. R. 8 Calc. 302;

(4) (1899) I. L. R. 23 Mad. 1.

L. R. 8 I. A. 229.

(5) (1909) I. L. R. 33 Bom. 452, 460.

Per Mookerjee J. A special text forming an exception to a general text should be construed strictly and applied only to cases falling clearly within it.

Gangu v. Chandrabhagabai (1) and *Anandi v. Hari Suba* (2) referred to

APPEAL by the defendant Kumar Gangadhar Bogla from the judgment of Chitty J.

This appeal arose out of a suit brought by the plaintiff Hira Lal Bogla praying for a declaration that he and the defendant were entitled in equal shares to the property of Rani Mohori Bibee, a widow of Raja Shew Bux Bogla, for administration, partition and other incidental relief. The appeal proceeded on the basis that certain property was the *stridhan* property of Rani Mohori Bibee, it being left for future determination whether in fact the property was *stridhan*, or whether it was the property of the husband.

Raja Shew Bux Bogla, a Hindu governed by the Mitakshara School of Hindu Law, married four wives in succession. By his first wife Soli Bibee he had no issue, and consequently he took a son in adoption in conjunction with her: that son was Hira Lal Bogla, the plaintiff. On the death of his first wife, the Raja married for the second time, and by his second wife he had a son Gangadhar Bogla, the defendant. After the death of his second wife he took a third one by whom he had a daughter, and on the death of his third wife, the Raja married Rani Mohori Bibee; there was no issue of this marriage.

In 1907 there were certain arbitration proceedings, in connection with the partition of the estate, which it is unnecessary to recapitulate for the purposes of this report.

On the 5th October, 1908 Raja Shew Bux Bogla died, leaving a will appointing Rani Mohori Bibee his sole

(1) (1907) I. L. L. 32 Bom. 275. (2) (1909) I. L. R. 33 Bom. 404, 409.

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executrix and bequeathing his estate to Rani Mohori Bibee for life and on her death to his son Gangadhar absolutely. The Rani obtained probate on the 11th December 1908.

On the 5th June, 1910, Rani Mohori Bibee died intestate. The present suit which was filed on the 29th July, 1910 was for the administration of her estate, which the plaintiff alleged consisted principally of jewels of considerable value. The plaintiff claimed that he and the defendant were entitled in equal shares to the estate of the Rani.

In his written statement the defendant alleged that after the adoption of the plaintiff by the Raja, he was made over as foster-son to the widow of the Raja's brother and ranked as her adopted son, and that he was estopped by the arbitration proceedings in 1907 from making his present claim. It was further urged that the defendant "as the natural son of Rani Mohori's co-wife, became alone entitled to inherit as her sole heir whatever property she left."

The suit came on for hearing before Chitty J. Issues were framed which are set out in his Lordship's judgment. His Lordship came to the conclusion that the plaintiff and defendant were entitled to succeed to the estate of Rani Mohori Bibee in equal shares and passed a decree for administration of the estate, observing as follows :—

"This is a suit filed by Hira Lal Bogla against his brother Gangadhar Bogla for a declaration that the brothers are entitled to share equally in the estate of Rani Mohori Bibee, widow of their father Raja Shew Bux Bogla ; for administration of the estate by the Court ; and for other relief. Mirza Mull and Raja Shew Bux Bogla were brothers, members of a joint Hindu family, governed by the Mitakshara School of Hindu LAW. Mirza Mull died leaving a widow, Bhuni Bibee, and a son Ballay Dass. Ballay Dass and his wife Bhugwandi both died shortly after Mirza Mull. The plaintiff had been adopted by Raja Shew Bux Bogla and his first wife Soli Bibee. Soli died and Raja Shew Bux married Moni Bibee, by whom he had a son, the

defendant Gangadhar. Moni died and Raja Shew Bux married Sundar Bibee, by whom he had a daughter Fulbai. Sundar died and he married a fourth wife Mohori Bibee. Raja Shew Bux Bogla, his two sons, his wife Mohori Bibee, and Dhuni Bibee, widow of Mirza Mull, in 1907, submitted their family disputes to the arbitration of Hardatrai Praladka and Rauniranjan Das Murarka, who made their award on 15th September, 1907. That award was filed in and became a decree of this Court, in spite of the opposition of Mohori Bibee.

Raja Shew Bux Bogla died leaving a will, by which he left his property to Mohori Bibee for her life and after her death to the defendant Gangadhar.

Mohori Bibee died intestate on 5th June, 1910, leaving property of considerable value consisting principally of jewellery. A box containing such jewellery is, I am told, now in the custody of the National Bank of India.

The following issues were raised —

- (i) Were the ornaments claimed in the plaint the separate *Stridhan* property of Mohori Bibee or did they belong to Raja Shew Bux Bogla?
- (ii) Are the ornaments items 1-14 in the list to the award the Debutter property of Shatyanarain Jew?
- (iii) Is the plaintiff estopped from claiming as an heir of Mohori Bibee?
- (iv) Is the plaintiff estopped from claiming the jewellery in suit as against the defendant by reason of the award dated 15th September, 1907?
- (v) Is the plaintiff an heir of Mohori Bibee?
- (vi) If so, to what shares in her estate would the plaintiff and defendant be respectively entitled?
- (vii) Whether, if plaintiff is entitled to participate in the inheritance, he is not bound to contribute to the expenses of the *stradh* of Mohori Bibee and the payment of her debts?

It is unnecessary to discuss the first two issues. They will be investigated in the inquiry as to the estate of Mohori Bibee. I may, however, mention that it was stated at the Bar that there is now no question as to which of the ornaments were Debutter. Such as were dedicated to the idol have already been handed over for that purpose.

The answer to issue 7 is obvious. In the administration of Mohori Bibee's estate her funeral and *stradh* expenses and debts will have to be taken into account. If the defendant has properly expended money for those purposes he will be entitled to be recouped by the plaintiff *pro rata* out of the share, if any, allotted to him.

As to issues 3 and 4, no question of estoppel really arises, and the point was not seriously pressed by counsel for the defendant though it was not expressly abandoned. The adoption of Hirralal to Raja Shew Bux Bogla and his wife Soli Bibee is admitted. It was suggested that Hirralal had been

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subsequently taken in adoption to Mirza Mull and that he could not be allowed now to claim as the son of Raja Shew Bux Bogla. It is clear from the submission to arbitration and from the recitals to the award that this was not the case. At that time, 1907, Hira Lal was regarded as a son of Raja Shew Bux Bogla and the arbitration and award proceeded on that footing. The fact of his adoption to Mirza Mull is expressly negatived by the recitals to the award, and the property was divided, on a partition, between Raja Shew Bux Bogla and his two sons. The shares would have been different had Hira Lal been regarded as Mirza Mull's son. Hira Lal certainly did not take up that position. I find these two issues in favour of the plaintiff and against the defendant. The substantial question in this suit is that raised by the 5th and 6th issues, whether the plaintiff is an heir of Mohori Bibee, and, if so, in what shares do he and the defendant divide her estate. For the defendant it was contended (i) that the plaintiff being only the adopted son of one wife had no right of inheritance to a rival wife's *stridhan* as against a son subsequently born of a third wife, and (ii) that if he is an heir then he takes only $\frac{1}{4}$ th of what the legitimate son takes, in other words, $\frac{1}{8}$ th of the step-mother's estate.

For the plaintiff it was conceded that in succession to a father or to paternal relatives by the Law of the Mitakshara the adopted son would take a $\frac{1}{4}$ th share and the subsequently born legitimate son a $\frac{1}{8}$ th share of the estate. But it was contended that that is a special rule affecting that kind of succession, and that in the absence of any special rule applicable to the present case, the ordinary rule would apply and the adopted and legitimate sons would take in equal shares.

A number of texts, commentaries, and decided cases were referred to and the matter was fully argued on both sides. I have carefully considered the materials placed before me, but do not think that any useful purpose will be served by an elaborate discussion. The matter lies in a narrow compass, and it will be sufficient if I briefly indicate the conclusion at which I have arrived.

The first contention, raised on behalf of the defendant is unsupported, so far as I can see, by any authority, and moreover appears to be diametrically opposed to those decisions which say that as regards inheritance an adopted son is in all respects on an equality with the legitimate son except where such rights are expressly denied to him. I hold, therefore, that the plaintiff is entitled with Gangadhar to succeed to the estate of Mohori Bibee.

With regard to their shares in the inheritance, it is no doubt true that in succession to the estate of a father or a father's relatives the adopted son takes a lesser share than the legitimate son. But this is in consequence of express texts to that effect, and is one of the exceptions to the

general rule referred to in the decisions. There is no decision, so far as I am aware, which deals with the precise question of inheritance arising here, but there is a series of decisions laying down in general terms the equal rights of the adopted and legitimate son in all matters of inheritance, except where there is an express authority limiting those rights. It is not suggested that there is any text limiting the right of an adopted son to share equally with his legitimate brother in the succession to the *stridhan* of their step-mother. I need only refer to the cases of *Teencourree Chatterjee v. Dinonath Banerjee* (1), *Kali Komul Morumdar v. Uma Sunker Moitra* (2) affirming the decision of a Full Bench of this Court (3) and *Padmakumari v. Court of Wards* (4).

Against these decisions, and the principle underlying them, the defendant's counsel has not been able to cite a single case.

I accordingly hold that the plaintiff and defendant are entitled to succeed to the estate of Mohori Bibee in equal shares.

There will be the usual decree for administration of her estate with the necessary directions and enquiries. The defendant must pay to the plaintiff the costs of the second and third day's hearing before me, which have been occasioned by the contention raised by the defendant, in which he has failed. Further consideration and other costs of the suit will be reserved. Liberty to apply."

From this judgment the defendant appealed.

Mr. B. Chakravarti (with him *Mr. A. N. Chaudhuri* and *Mr. B. K. Lahiri*), for the appellants. The plaintiff was estopped from making his present claim in consequence of the arbitration proceedings and award in 1907. The appellant, as the natural son of a co-wife, is entitled in Law to the entirety of the Rani's estate to the exclusion of the respondent who is only an adopted son of the Raja taken in conjunction with another wife. Under the Mitakshara School, by which the parties are governed, the daughter is the preferential heir to a woman's estate. After her comes the woman's male issue. According to Manu, Chapter IX, verse 183, if among all the wives of the same husband,

(1) (1865) 3 W. R. 24

(3) (1880) 1 L. R. & Cals. 256

(2) (1883) L. R. 10 I. A. 138.

(4) (1891) 1 L. R. & Cals. 332

L. R. 8 I. A. 229.

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one brings forth a male child, all, by means of that son, are declared to be mothers of male issue. See Sastri's Hindu Law, 4th edition, paragraph 457, text 13. The consequence is that Mohori Bibee could not be said to be "apraja" (without issue), and clauses 9 and 11 of section XI of Chapter II of the Mitakshara have no application. It follows that the appellant succeeds to Mohori Bibee as her son by analogy. Now the respondent, as the adopted son, cannot so succeed, as this would involve an analogy upon an analogy which is repugnant to Hindu Law. An adopted son of a co-wife is not capable of conferring spiritual benefit—there can be no legal relationship between an adopted son and a wife not associating. Yajnavalkya, Chapter II, verses 117 and 114, referred to. Also Mayne's Hindu Law, 8th edition, pp. 218, 220. See also *Annapurni Nachiar v. Forbes* (1), *Kashushree Debi v. Greesh Chunder Lahoree* (2), *Dwarka Nath Ray v. Sarat Chandra Singh* (3). A natural step-son excludes an adopted step-son. All the commentators on the Mitakshara include the natural son of a co-wife within the term "son." See Balambhatta, Sethur, p. 853, Viramitrodaya, Chapter V, Part II, section 14, *Gridhari Lall Roy v. The Bengal Government* (4).

If Mohori Bibee be held to have been a childless widow, then the husband's heirs would inherit. Even in this case, the appellant is the nearer *sapinda* of his father and would inherit the entirety. If it be held that both the respondent and the appellant are entitled to inherit as *sapindas* of their father, then the respondent as an adopted son is entitled to obtain only one-fifth of the estate, four-fifths going to the appellant. See Vasishtha, Chapter XV, section 9, Dattaka Chandrika, section V, clause 17.

(1) (1899) I. L. R. 23 Mad. 1.

(2) (1864) W. R. 71.

(3) (1911) 15 C. W. N. 1036.

(4) (1868) 12 Moo. I. A. 448.

Mr. B. L. Mitter (with him *Mr. B. K. Ghosh*), for the respondent. No question of estoppel can arise : an adopted son cannot renounce his status. By virtue of adoption, an adopted son has the same status in the adoptive father's family as a natural born son, Vyavastha Chandrika, Vol. I, p. 18, *Annapurni Nachiar v. Collector of Tinnevelly* (1), *Annapurni Nachiar v. Forbes* (2), *Radha Prasad Mullick v. Rane Mani Dassee* (3), *Mahadu Gani v. Bayaji Sidi* (4), *Narasammal v. Balaramacharlu* (5) Stranges' Hindu Law, Vol. I, p. 97. Mayne's Hindu Law, 8th edition, p. 215. The adopted son of one of several wives is deemed to be the son of the wife adopting and the step-son of co-wives: *Annapurni Nachiar v. Collector of Tinnevelly* (1), *Annapurni Nachiar v. Forbes* (2), West and Buhler's Hindu Law, pp. 522, 1181, Mayne's Hindu Law, p. 221, G. Sastri on Adoption, p. 183. An adopted son is his father's sapinda, and as regards sapinda relationship there is no difference between an adopted son and a natural born son. Dattaka Mimansa, section VI, paragraphs 32 and 39, Dattaka Chandrika, section III, paragraphs 18 and 24, *Joy Kishore Chowdhry v. Panchoo Baboo* (6). Both the adopted son and natural born son of a co-wife succeed to the step-mother's stridhan as sapindas of the husband, Vyavastha Chandrika, Vol. II, p. 521, Bannerjee on Stridhan (3rd edition), pp. 375, 378, 379, Mitakshara, Chapter II, section XI, paragraphs 9, 11, 25. The text in the Mitakshara must be construed in its ordinary sense. Mohori Bibee must be deemed to have died "without issue." The text in Manu relied on by the appellant has no reference to questions

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- (1) (1895) I. L. R. 18 Mad. 277
 (2) (1899) I. L. R. 23 Mad. 1.
 (3) (1916) I. L. R. 33 Calc. 947.

- (4) (1893) I. L. R. 19 Bom. 239.
 (5) (1863) I. Mad. H. C. R. 420.
 (6) (1879) 4 C. L. R. 539.

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of inheritance, *Bhimacharya v. Ramacharya* (1). Unless there be an express text curtailing the adopted son's right, he will be entitled to the same share as a natural born son. *Joy Kishore Chowdhry v. Panchoo Baboo* (2), *Uma Sunker Moitra v. Kali Komul Mozumdar* (3), *Kali Komul Mozumdar v. Uma Sunker Moitra* (4), *Birbhadrath Rath v. Kalpitaru Panda* (5), *Padmakumari Debi v. Court of Wards* (6). Dattaka Mimansa and Dattaka Chandrika have no text covering the present point, as they do not deal with a plurality of wives. *Raghunand Doss v. Sadhu Churn Doss* (7) has been doubted in *Raja v. Subbaraya* (8) and *Baramanund Mahanti v. Chowdhry Krishna Charan Patnaik* (9). In Hindu Law a special text forming an exception to a general text should be strictly construed. *Gangu v. Chandrabhagabai* (10), *Anandi v. Hari Suba* (11). As regards succession to collaterals, in the absence of an express text, the adopted and natural son take equally. *Surjokant Nundi v. Mohesh Chunder Dutt* (12).

Mr. Chakravarti, in reply.

SANDERSON C. J. This is a suit by Hira Lal Bogla against his brother Gangadhar Bogla in which the plaintiff asks for a declaration that he and the defendant are entitled in equal shares to the property of Rani Mohori Bibee, a widow who had been the fourth wife of Raja Shew Bux Bogla, for administration and partition of Mohori Bibee's estate and other incidental

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| (1) (1909) I. L. R. 33 Bom. 452. | (7) (1878) I. L. R. 4 Calc. 425. |
| (2) (1879) 4 C. L. R. 538, 555. | (8) (1883) I. L. R. 7 Mad. 253. |
| (3) (1880) I. L. R. 6 Calc. 256. | (9) (1884) 14 C. L. J. 183. |
| (4) (1883) I. L. R. 10 Calc. 232; | (10) (1907) I. L. R. 32 Bom. 275. |
| L. R. 10 I. A. 139. | (11) (1909) I. L. R. 33 Bom. 401. |
| (5) (1905) 1 C. L. J. 388. | (12) (1882) I. L. R. 9 Calc. 70. |
| (6) (1881) I. L. R. 8 Calc. 302; | |
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relief. The case raises the question whether the plaintiff, who was the adopted son of Raja Shew Bux Bogla and his first wife, is entitled to any (and if so what) share of the *stridhan* property of Raja Shew Bux Bogla's fourth wife in competition with the defendant who was the son of the Raja and his second wife.

The details of the family tree are given in the judgment of Chitty J. and I need not repeat them; the only point which I need emphasize being that the fourth wife, whose property is in question, died without issue. It appears that a box of jewellery, alleged to be valuable, which had been deposited in a bank by Mohori Bibee, constituted the main part of her estate. It was, however, alleged by the plaintiff, though denied by the defendant, that there was other property belonging to Mohori Bibee besides the jewellery, viz., certain hundis.

The first of the issues raised was as follows:— Were the ornaments claimed in the plaint the separate *stridhan* property of Mohori Bibee, or did they belong to Raja Shew Bux Bogla?

This issue has not yet been decided, and the result may be that if on the enquiry, which must be held hereafter, it turns out that the jewels in question were the property of the Raja and were not the separate *stridhan* of Mohori Bibee, the above-mentioned question would not arise; for the jewels would pass under the Raja's will to the defendant, and if there were no other property of Mohori Bibee besides the jewellery, then the discussion which we have had would become merely academic.

It was not until some considerable time had been occupied in argument that the true position became clear to the Court, otherwise personally I should have been in favour of postponing the decision of this case until the above-mentioned enquiry had been held.

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But in view of the fact that considerable time had already been spent over the case, and that in one event the point will be material, we come to the conclusion that in the interests of the parties it would be best for us to give a decision at once.

It is agreed that the family were governed by the Mitakshara School of Hindu Law, but the learned counsel for the defendant urged that the Mitakshara was uncertain or doubtful on the point in question and relied upon a passage in Manu—on the other hand it was argued for the plaintiff that the provisions of the Mitakshara were clear and admitted of no doubt. The Mitakshara in Chapter II, section 11, para. 9, provides as follows:—"If a woman die without issue, that is, leaving no progeny, in other words, having no daughter, nor daughter's daughter, nor daughter's son nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be (forthwith) explained." Paragraph 11 contains further provisions as to the succession of a woman dying without issue, having regard to the different forms of marriage. This marriage, it was agreed, must be taken to be governed by one of the first named four modes in which event the whole property of a woman dying without issue as before stated belongs in the first place to her husband; on failure of him it goes to the nearest kinsman (*savinda*). This is confirmed by paragraph 25.

It was argued, however, on behalf of the defendant that these paragraphs do not apply to this case, because it was said that Mohori Bibee was not a woman who died without issue, and reliance is placed upon the text of Manu, which says that "If among the wives of the same man one becomes mother of a son, Manu says that by that son all of them become mothers of male children," and inasmuch as Raja

Shew Bux's second wife had a son, viz., the defendant. Mohori Bibee, his fourth wife became a mother of male issue, and, therefore, did not die without issue. In other words the learned counsel's first and main point was that the defendant succeeded as the direct issue of Mohori Bibee, and that the plaintiff, being merely an adopted son, did not take a share.

In my judgment this argument ought not to prevail.

Even if the text in Manu has reference to questions of inheritance, as to which there seems considerable doubt [see *Annavurni Nachiar v. Forbes* (1) and *Bhimacharya v. Ramacharya* (2)], in my judgment the provisions in the paragraphs in the Mitakshara, to which I have referred, are not uncertain or doubtful and they govern this case. An examination of the provisions of this section of the Mitakshara convinces me that the paragraphs, which are material to this case, viz., 9 and 11, refer to the case of a woman dying without issue in the ordinary meaning of the words, and that the fiction created by the above-mentioned text in Manu does not exclude the case from these provisions.

Applying, therefore, the rules laid down, the property of Mohori Bibee on her death would have belonged to her husband if he had been alive; but on failure of him, it goes to his nearest kinsmen *sapindas*.

Both the plaintiff and defendant are *sapindas* of their father, but it was contended on behalf of the defendant that he was the nearest *sapinda*, and was superior to the plaintiff who was merely an adopted son. With this I do not agree: with respect to this matter I think that the rights of the plaintiff, the adopted son, are similar to those of the defendant, the

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natural born son [see *Joy Kishore Chowdhry v. Panchoo Baboo* (1), *Padma Kumari Debi v. Court of Wards* (2)] and that they both share in the property of Mohori Bibee as *sapindas* of their father.

The next point taken on behalf of the defendant was that even if both the plaintiff and defendant came in as *sapindas* of their father, the rule which is applicable in certain cases, viz., that the adopted son takes one-fifth only, should be applied to this case, which is one of competition between a real and an adopted son. The rule upon such a point as this has been laid down by the Privy Council in *Padma-kumari v. Court of Wards* (2) as follows:—An adopted son occupies the same position in the family of the adopter as a natural born son except in a few instances which are accurately defined both in the Dattaka Chandrika and Dattaka Mimansa.

Now there has been no text produced which exactly covers the case in question, but the learned counsel for the defendant relies on a passage in Mr. Sastri's *Hindu Law*, 4th Ed., p. 171, which refers to the Dattaka Chandrika. This authority apparently extends the above-mentioned rule to cases of partition between male descendants in the male line down to the great-grandson where there is competition between an adopted and real descendant, and he arrives at that result by way of an analogy which might cover all cases in which there is such a competition.

In my judgment, however, the proper course to adopt is to apply the rule laid down by this Court in the above-mentioned case, *Joy Kishore Chowdhry v. Panchoo Baboo* (1) and in the above-mentioned Privy Council decision (2), viz., that the rights of an adopted son unless curtailed by express texts, are in every

(1) (1879) 4 C. L. R. 533, 555. (2) (1881) I. L. R. 8 Cal. 322;

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respect similar to those of a natural son, and as there is no express text curtailing the rights of an adopted son who, like the plaintiff in this case, is claiming succession to a share of the property of his adopting father's fourth wife, in my judgment, the plaintiff is entitled to share equally with the defendant.

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Since the judgment was written my attention has been drawn to the decision of the Privy Council in *Nagindas Bhagwandas v. Bachoo Hurkissendas* (1), which was given on the 26th November, 1915, and the report of which has only recently reached this country. On the points which are material to this case, it confirms the conclusions I had arrived at.

As to the argument of estoppel which was raised but not strongly urged, there is nothing in the submission to arbitration or the award which, in my judgment, prevents the plaintiff from making the claim in this case.

Finally the learned counsel for the defendant asked that the question whether Mohori Bibee had any property of her own should be tried by a learned Judge on the Original Side, and intimated that he would take this issue at the defendant's risk.

In my judgment it is desirable that this issue should be disposed of as soon as possible: if decided in one way, it will dispose of the whole case and this may save the parties further expense, and the best way of getting a decision on this issue will be to refer it for trial to a Judge on the Original Side.

This appeal will be dismissed with costs. The costs of the issue to be tried will be in the discretion of the learned Judge who tries it.

WOODROFFE J. I am of opinion that the text of Manu, according to which the son of a man by one of

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his wives is as a son to all his wives who are thus all mothers, does not operate for the purpose of determining the succession so as to make the appellant issue of Sreemutty Mohori Bibee. In my opinion the appellant is not entitled to claim as the son of that lady. It is unnecessary then to consider whether this text should be construed to include also the plaintiff Hira Lal, who was an adopted son of Raja Shew Bux Bogla through his wife Soli Bibee, as well as Gangadhar his natural son through his second wife Mohori Bibee. But if the text were to be held applicable to establish the appellant's contention that he by a fiction takes as son of, the deceased which in fact he was not, then as neither the one nor the other are sons of Mohori Bibee in the natural sense of that term, I should in that case have seen no sufficient ground for distinguishing between the positions of the plaintiff and the defendant, and both plaintiff and defendant would be heirs in equal shares. As, however, pointed out by Chandavarkar J. in *Bhimacharya v. Ramacharya* (1), the text of Manu, on which learned counsel for the appellant relies, has been explained in such a way as to imply that its application is of a limited character having no necessary reference to questions of inheritance. There are difficulties in applying that text in the way suggested by the appellant which the judgment of my brother Mookerjee explains. In my opinion, according to the Mitakshara text, both the appellant and respondent succeed to the *stridhan* of their step-mother as the *sapindas* of their father her husband, and the appellant does not come in as issue as he contends. For Hira Lal as the adopted son of Soli Bibee is the step-son of the deceased just as Gangadhar is. The question then arises whether, if both the plaintiff and defendant are entitled to

claim as *sapindas* of their father, in what shares do they take. For the appellant it is argued that in that case the plaintiff as adopted son is only entitled to one-fourth which, according to the decision of this Court, is one-fourth of that which the defendant gets or one-fifth to his four-fifths. The natural justice of the case favours equality of division, for Hira Lal on being adopted ceased to belong to his natural family and should not in the absence of any provision to that effect suffer by reason of the birth of the natural sons to the father by other wives than she who was associated in such adoption. Though in succession to the estate of a father the adopted son takes a lesser share than the natural born son, no authority has been cited which directly establishes such a rule in the present case of inheritance to *stridhan* where neither plaintiff nor defendant are the natural or adopted sons of the lady whose property is claimed and where no natural reason exists for distinguishing between their respective cases. On the other hand, both are *sapindas*, and as regards this *sapinda* relationship there is no difference between an adopted and natural son. The adopted son is his father's *sapinda* as the natural son is. Both are then entitled as *sapindas* of their father the deceased's husband. There is no competition between them unless (as is not the case) there is any text which establishes a preferential claim in favour of the adopted son. As against this there is authority in favour of holding that the adopted son in general occupies the same position as a natural son. Thus in *Joy Kishore Chowdhry v. Panchoo Baboo* (1), it was held that the rights of an adopted son, unless contracted by express texts, are in every respect similar to those of a natural born son. There is, therefore, in my

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opinion, no ground for disturbing the decision of Chitty J. on this point. But in the absence of any special rule affecting the kind of succession before us, the plaintiff and defendant or adopted and natural step-sons of the deceased should take in equal shares. I hold, therefore, upon the fifth and sixth issues that the plaintiff is an heir of Mohori Bibee and that he is entitled to an equal share in her estate (whatever it may be) with the defendant.

What that estate is, and in particular whether the ornaments claimed in the plaint were in fact the *stridhan* property of the deceased to which the above findings apply, is not here decided, for the facts are not before us nor any finding thereon. Mr. Chakravarti, for the appellant, has contended that the deceased had no estate which the Court can administer and that he should have been permitted to lead evidence as to this at the time so that an administration account might have been avoided. On the other hand, it is contended that the defendant has admitted that there is some estate, and therefore the question what that estate is will be determined under the preliminary administration decree. I think that this matter should have been determined at the trial, for if it turned out that there was no property of the deceased the suit would have been dismissed, and if the amount of the estate had been shown to be trivial, the plaintiff might not have elected to take an administration decree. The Court should, therefore, first determine whether there is any estate of Sreemutty Mohori Bibee and only in the event of its finding in the affirmative make an administration decree. As regards issues 3 and 4, the estoppel alleged is not in my opinion established, and no question has arisen in this appeal as to the learned Judge's finding on the last or seventh issue. This disposes of all the issues raised.

In my opinion the appeal fails and should be dismissed with costs.

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MOOKERJEE J. This appeal involves an important question of Hindu Law of first impression, which may be formulated in these terms. A Hindu lady, governed by the Mitakshara School of Law, dies possessed of *stridhan* property; the rival claimants to her estate are, respectively, an adopted son of her husband taken in conjunction with another wife, and a son of her husband born of the womb of a third wife; is the latter the preferential heir in competition with the former, or do they both succeed by right of inheritance; if so, do they take in equal or in unequal shares? This question has arisen in connection with the estate alleged to have been left by Rani Mohori Bibee, the widow of Raja Shew Bux Bogla of this city. The Raja successively took four wives. He had no son by his first wife, and consequently took a son in adoption in conjunction with her; that son is the plaintiff in these proceedings and is the respondent before us. After the death of his first wife, the Raja took a second wife, by whom he had a son, the defendant in these proceedings, and appellant before us. After the death of the second wife, the Raja took a third wife by whom he had a daughter; we are not concerned with her in these proceedings. After the death of the third wife, the Raja took Mohori Bibee as his fourth wife; the Raja subsequently died on the 5th October, 1908, and about two years later, the Rani died on the 5th June, 1910. The appellant claims her whole estate as her sole heir, and contends, in the alternative, that he is entitled to at least a four-fifths share thereof. The respondent asserts, on the other hand, that he is entitled to a half share of the estate left by the co-wife of his adoptive mother.

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Mr. Justice Chitty has upheld this contention. The defendant has reiterated in this Court the objections unsuccessfully urged on his behalf before the trial Judge, and his claim has been sought to be sustained by reference to texts of Manu (IX, 183) and Yajnavalkya (II, 117, 145). Indeed, no reference was made to the Mitakshara by the counsel for the appellant till his attention was drawn therefo by the Court. It is, consequently, desirable to emphasise the cardinal rule enunciated by Sir James Colvile in *Collector of Madura v. Mootoo Ramalinga Sathupathy* (1), namely, that the duty of an European Judge who is under the obligation to administer Hindu Law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage, for, under the Hindu system of law, clear proof of usage will outweigh the written text of the law. The parties to this litigation are admittedly governed by the Benares School of the Mitakshara Law, and we must consequently turn in the first place to the Mitakshara, which, in the words of Sir James Colvile, is universally accepted by all the schools, except that of Bengal, as of the highest authority, and which, in Bengal, is received also as of high authority, yielding only to the Dayabhaga in those points where they differ.

Section XI of the second chapter of the Mitakshara, as translated by Colebrooke, treats of the separate property of a woman. The first eight paragraphs embody an exposition of the nature of *stridhan*. The author next propounds the distribution of *stridhan* on the basis of the text of Yajnavalkya (II, 115), "her

kinsmen take it, if she die without issue." Paragraph 9 lays down that if a woman die without issue, that is, leaving no progeny, that is, having no daughter, nor daughter's daughter, nor daughter's son, nor son's son, the woman's property shall be taken by her kinsmen, namely, her husband and the rest. Paragraphs 10 and 11 distinguish different heirs according to the diversity of the marriage ceremonies; it is there laid down that in any of the four approved modes of marriage, the property belongs, in the first place, to her husband; on failure of him, it goes to his nearest kinsmen (*sapindas*). Vijnaneswara then proceeds, in paragraph 12, to consider the case of the woman who leaves progeny, i.e., has issue, and, in the six following paragraphs, defines the order of succession of daughters and their descendants. We next come to paragraph 19: "If there be no grandsons in the female line, sons take the property; for it has been already declared 'the male issue succeeds in their default' (Yajnavalkya II, 118). Manu (IX, 192) likewise shows the right of sons as well as of daughters to their mother's effects: 'When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate.'" Paragraph 20 interprets this to mean that brothers and sisters do not succeed together, but that one class excludes the other. Paragraph 21 follows with an explicit statement that the whole blood is mentioned to exclude the half blood. Paragraphs 22 and 23 deal with the exceptional case of the daughter of a rival wife of a superior class, who takes the property of a childless step-mother of an inferior class. Paragraph 24 treats of grandsons who, on failure of sons, inherit the wealth of their paternal grandmother. Paragraph 25 then lays down that, on failure of grandsons also, the husband and

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other relatives succeed, and thus brings us back to the rule formulated in paragraph 9. The question consequently arises, whether the lady, whose estate forms the subject of controversy, died "without issue" within the meaning of paragraph 9, or "left progeny" within the meaning of paragraph 12. The appellant maintains the latter alternative, and in support of his contention relies upon the text of Manu (IX, 183): "if among all the wives of one husband, one has a son, Manu declares them all to be mothers of male children through that son." The argument is founded on this text, that if one of the several wives of a person gives birth to a son, all the wives become the mothers of such son, who thereupon becomes entitled to succeed by inheritance to the wealth of all the wives of his father, as if he were their son within the meaning of the text of the Mitakshara. In my opinion, this process of reasoning is based on a manifest misapplication of the text of Manu. Kulluka Bhatta and Raghavananda, two of the commentators of Manu (Mandalik's edition, p. 1208), explain the purpose of this text; the former points out that an adoption by the childless wife is excluded in such a case; the latter observes that this excludes levirate. This is also the view taken by Sarvajnanarayana, another commentator of Manu. In this view, it is needless to consider whether the term मुत्तिनी in the text of Manu means औरस मुत्तिनी (mother of a naturally born son) as the commentator Nandana interprets it. It is sufficient for our present purpose to note that texts of the same import are found in other Institutes, which indicate that this fiction had a very restricted application. Thus, Vishnu (XV, 41) ordains that "amongst wives of one husband also, the son of one is the son of all;" this is asserted to show that such son must present funeral oblations to all the

wives of his father after their death (S. B. E., Vol. VII, 65). To the same effect is the ordinance of Vasishtha (XVII, 11): "if among many wives of one husband, one have a son, they all have offspring through that son; thus says the Veda." This has no reference to the right of succession of the son to the wealth of the wives of his father (S. B. E., Vol. XIV, p. 85). The context where the text mentioned occurs in Manu makes it reasonably plain that it has no reference to the question now under consideration. The text which immediately precedes declares as follows: "if among brothers, sprung from one father, one have a son, Manu has declared them all to have male offspring through that son." This is quoted in the Mitakshara (Chapter I, section 11, paragraph 36) and is explained by Vijnaneswara as intended to forbid the adoption of others, if a brother's son can possibly be adopted, but not intended to declare him as the son of his uncle. It may be observed here parenthetically that the Judicial Committee have ruled that not only does not this text invalidate an adoption in such circumstances, but that all texts which prescribe the preferential adoption of the son of a brother of a whole blood are merely binding upon the consciences of pious Hindus and do not possess the imperative force of laws, *Wooma Daee v. Gokoolanund Dass* (1). I feel no doubt that a similarly restricted interpretation should be adopted in the case of the text whereon the appellant relies, and this view is plainly indicated by the Judicial Committee in *Annapurni Nachiar v. Forbes* (2) where this very text of Manu is quoted and its scope and purpose explained as follows: "We must suppose that all take the spiritual benefits of male issue; but the law is clear that for the purpose of

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(1) (1878) I. L. R. 3 Calc. 537.

(2) (1893) I. L. R. 23 Mad. 1.

I. L. R. 24 I. L. 216

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inhéritance, the natural mothers and fathers respectively are preferred." If the contention of the appellant were to prevail, whenever a son is born of the womb of one of the wives of a person, all his wives would stand in the position of mothers to the boy and would be entitled to succeed to him equally by right of inheritance ; for it would be obviously illogical to hold that the ladies become his mothers, but he does not become their son. Yet it was ruled by a Full Bench of this Court in *Lala Joti Lal v. Duranikower* (1), that according to the Mitakshara, in a divided family, a step-mother cannot succeed to the estate of her stepson ; and this exposition of the law has been accepted as correct for over half a century.

Further, it is plain that the argument of the appellant involves an *Atideca* upon an *Atideca*, that is, a fiction upon a fiction, or a remote analogy on a remote analogy ; the adopted son would by a fiction be a real son of the adopter, and, then, by another fiction, a real son, not only of the adoptive mother, but of all the other wives of the adoptive father ; a train of reasoning most repugnant to a Hindu jurist. We may also add that the contention of the appellant is not supported by the decisions in *Manilal Rewadat v. Bai Rewa* (2), *Mahadu Ganu v. Bayaji Sidu* (3), and *Bai Kesserbai v. Hunsraj Morarji* (4), where a co-widow was preferred to the husband's brother and husband's brother's son as heiress to the *stridhan* of a Hindu widow who had died without issue ; nor is assistance derived from *Bachha Jha v. Jugmon Jha* (5), where, under the Mithila law, the husband's brother's son was preferred to the sister's son. We have been pressed, however, with the opinion of commentators on the Institutes of

- (1) (1864) I. L. R. (F. B.) 67 ; (3) (1893) I. L. R. 19 Bom. 239.
W. R. (F. B.) 173. (4) (1906) I. L. R. 30 Bom. 431.
(2) (1892) I. L. R. 17 Bom. 758. (5) (1885) I. L. R. 12 Calc. 318.

Yajnavalkya as also on the Mitakshara, but, in my opinion, they do not support the contention of the appellant that in paragraph 19 of section XI of Chapter II of the Mitakshara the term son includes the son of a rival wife. I am not now concerned with the question, which may, perhaps, hereafter arise, whether the term son includes a son taken by the woman in adoption in conjunction with or under an authority conferred by her husband. The only question for determination now is, whether the expression includes the son of a rival wife. In my opinion, the answer must be in the negative; the terms used by Yajnavalkya and Vijnaneswara, namely, अप्रजस्ति, and अनपश्यत् make it clear that the text refers to the case where the woman dies "without issue" or "leaves no progeny" in the ordinary acceptation of those phrases. This is made clearer by the phrase used in paragraph 12, प्रसुता अपश्यती, that is "a woman who has given birth to child." This is further emphasised in paragraph 19, where reference is made to the text of Manu (IX, 192) which speaks expressly of uterine brothers and uterine sisters. It is inconceivable that Vijnaneswara should have used the expressions he did in paragraphs 9, 12 and 19 or referred to the text of Manu (IX, 182), if he had intended to import into the term son a secondary sense of step-son. Why should we impute to Vijnaneswara a manifest violation of an elementary rule of interpretation, namely, that he uses the same word in two different senses in the course of the same discussion [Dattaka Mimansa II, 35; Vyavahara Mayukha, Ch. I, Sec. I. 11-15, Dayabhaga, Ch. III, Sec. II, pl. 30, which furnish illustrations of the Arthaikatva Axiom, to a word or sentence occurring at one and the same place, a double meaning should not be attached (सत्तुभृतः प्रदः सत्तदेवार्थं समर्थम्)]; for let it not be overlooked that although in the trans-

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lation by Colebrooke, the text of the Mitakshara is divided into distinct paragraphs, in the original the passage appears as one continuous and unbroken discussion. Reference has been made to Subodhini (Setlur's Ed., pp. 848-853), the Balambhatti (Setlur's Ed., p. 853, l. 9) (both commentaries on the Mitakshara), the Viramitrodaya (Ch. V, Pt. II, section 14), Apararka (Anandastama Ed., Vol. II, 754), Vivada Ratnakara (Ch. X.) and Kamalakara (Baroda Ed., p. 462); *Dwarkanath Ray v. Sarat Chandra Singh* (1). These do not support the contention that the term "son" in paragraph 19 includes the son of a rival wife, though some of them, for instance, the Viramitrodaya apparently treats the son of a rival wife as a preferential heir to the husband. I am not now concerned with the question, whether the son of a rival wife can be squeezed in between the son and the husband and thus allowed to break through the compact line of heirs enumerated in the Mitakshara in paragraphs 20-24, but I may state that I do not at present see any plausible answer to, much less any valid criticism on, the view expounded by Chandavarkar J. in *Bhimacharyya v. Ramcharayya* (2). That view is supported by a number of commentators, amongst others by Apararka (Vol. II, p. 754) and Kamalakara (p. 462). I hold accordingly that neither the appellant nor the respondent is qualified as son, to take by inheritance the estate of their step-mother who died without issue and left no progeny. It follows necessarily that her estate, upon her death, has devolved upon the *sapindas* of her husband in accordance with paragraph 25 read with paragraphs 9 and 11 of Ch. II, section 11, of the Mitakshara. The appellant and the respondent are incontestably *sapindas* of their

father in the same degree, and consequently they have jointly inherited the estate of their step-mother.

The question then arises for consideration, whether the plaintiff and the defendant are entitled to the estate in equal halves or whether the respondent as the adopted son of his father is in a position of relative disadvantage. The appellant affirms the latter alternative and relies upon the well-known text of Vasistha : "if after he has been adopted, a legitimate son be born, then the dattaka shall obtain a fourth share." This is of no assistance to the appellant; for the context shows that the text of Vasistha refers only to the estate of the adoptive father (Vasistha XV, 1-9, S. B. E. Vol. XIV, p. 76). I am not unmindful that the principle has been extended to other cases (Dattaka Mimansa X, 1; Dattaka Chandrika II, 11, V. 17), but there is no text directly applicable to the contingency before us. On the other hand, we have the text of Vriddha Gautama cited in the Dattaka Mimansa (V, 43) which says that an adopted son endowed with excellent qualities and an after-born son are equal sharers. Of similar significance is the qualification formulated by Vasistha himself (XV, 10), "provided he be not engaged in rites procuring prosperity" which Krishna Pandit interprets as indicating that in this case the estate is to be divided equally between the legitimate son and the adopted son; the interpretation adopted by the author of the Dattaka Chandrika (V, 17-18) is obviously forced, and, if one may say so without impropriety, erroneous. There is thus plain indication that even in archaic times, the rule was deemed harsh and an endeavour was made to restrict its operation. Consequently, we should not extend its application to cases, not only not comprised strictly within its letter, but undoubtedly beyond its true spirit; in this connection we may bear in mind that

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Hindu jurists, quite as much as English jurists [*Ebbs v. Boulnois* (1)], recognise the well-known canon of interpretation that a special text or statute forming an exception to a general text or statute should be construed strictly and applied only to the cases falling clearly within it; the Mitakshara itself recognises the principle that where an exception exists to a general rule, the exception should be confined within the strictest limits so as not to encroach unduly upon the general rule [*Gangu v. Chandrabhagabai* (2), *Anandi v. Hari Suba* (3), Dattaka Chandrika, section V, 27, Mitakshara on Prayaschitta, Ed. Moghe, p. 292. शब्दव्य वृचिते अनुयत्तं प्रश्नमो न भवति तात्पर्यनीयम्]. That the rule is not of universal application is clear from the decision in *Surjokant Nundi v. Mohesh Chunder Dutt Mozoomdar* (4), where an adopted son of one daughter and the legitimate son of another daughter were held to be equal sharers in the estate of their maternal grandfather. The only case where the rule has been applied, though it is not covered expressly by the text of Vasistha, is *Raghubanund Doss v. Sidhu Churn Doss* (5), where partition was sought amongst the members of a joint Mitakshara family composed of the adopted son of one brother and the legitimate sons of the two other brothers. The correctness of this decision, which is in conflict with *Tara Mohun Bhattacharjee v. Kripa Moyee Debia* (6) and *Dinonath Mukerji v. Gopalchurn Mukerji* (7), was doubted in *Baramanand Mahanti v. Chowdhry Krishna Charan Patnaik* (8), *Birabhadra Rith v. Kalpataru Panda* (9) and *Raja v. Subha Raja* (10).

(1) (1875) I. R. 10 Ch. App. 479, 484. (6) (1868) 9 W. R. 423.

(2) (1907) I. L. R. 32 Bom. 275. (7) (1881) 8 C. L. R. 57;

(3) (1909) I. L. R. 33 Bom. 404, 409.

9 C. L. R. 377.

(4) (1892) I. L. R. 9 Calc. 70.

(8) (1884) 14 C. L. J. 183.

(5) (1878) I. L. R. 4 Calc. 425.

(9) (1905) 1 C. L. J. 338.

(10) (1883) I. L. R. 7 Mad. 253.

It was, however, recently followed by the Bombay High Court in *Bachoo Harkisondas v. Nagindas Bhaywandas*.(1). On appeal to the Privy Council, the decision of the Bombay High Court has been reversed and the view adopted by this Court in *Raghubanund Doss v. Sadhu Churn Doss*(2) definitely overruled by a judgment which has been received in this country since the present judgment was composed, *Nagindas v. Bachoo*(3). The position then is that there is neither authority nor principle which can be successfully invoked by the appellant in support of his contention that the estate of his step-mother should be unequally divided as between himself (the real son of his father) and the respondent (the adopted son of his father). We are consequently thrown back upon the fundamental position, recognised in a long series of decisions, that the adopted son becomes for all purposes the son of the father by adoption and occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined in the *Dattaka Chandrika* and the *Dattaka Mimansa*, *Sumbhu Chunder Chowdhry v. Naraini Dibesh*(4), *Padmakumari Debi v. Court of Wards*(5), *Kali Komul Mozumdar v. Umashunker Moitra*(6), *Umashunker Moitra v. Kali Komul Mozumdar*(7), *Joykishore Chowdhury v. Panchoo Baboo*(8), *Anandi v. Hari Suba*(9), *Maharajah Juggernath Sahaie v. Musst. Mukhum Koonwur*(10), *Teencourree Chatterjee v. Dinonath Banerjee*(11), *Radhaprasad Mullick v.*

(1) (1914) 16 Bom. L. R. 263.

(6) (1883) I. L. R. 10 Calc. 232.

(2) (1878) 1 I. L. R. 4 Calz. 425.

(7) (1883) 1 I. L. R. 6 Calc. 255.

(3) (1915) 1 I. L. R. 40 Bom. 270,

(8) (1879) 4 C. L. R. 533.

L. R. 43 I. A. 56.

(9) (1909) 1 I. L. R. 33 Bom. 44.

(4) (1855) 3 Knapp 55.

(10) (1865) 3 W. R. 24.

(5) (1881) 1 I. L. R. 8 Cal. 322,

(11) (1875) 3 W. R. 49.

L. R. 81 I. A. 229.

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Rinneemani Dassee (1), *Narasamnal v. Balaramacharlu* (2), *Annapurni Nachiar v. Collector of Tinnevelly* (3). The only point for consideration then is whether there is any text applicable to the present case which reduces the share of the adopted son. I have not been able to trace any text expressly applicable, nor can I find any which even by implication supports the contention of the appellant. I am not unmindful that in Ch. II, section XI, paragraph 9, of the Mitakshara, the property goes to the kinsmen of the woman, namely, her husband and the rest, and in paragraph 11, on the failure of the husband, it goes to his *sapindas*. In my opinion, this does not show that the property descends as if it belonged to the husband; the only effect of the two paragraphs is to determine the heir to the woman by application of the test of *sapindaship* with her husband. It follows accordingly that the respondent takes the same share in the estate of her step-mother as he would have done if he had been a real and not the adopted son of his father. I hold finally that Mr. Justice Chitty correctly decided both the points in the case.

As regards the question of estoppel, there is nothing in the arbitration proceedings which debars the respondent from contesting the claim of the appellant, and the point which indeed was not seriously pressed does not require elaborate investigation.

I agree with the Chief Justice and Mr. Justice Woodroffe in the directions they propose to give with regard to the costs and the further trial of the suit.

Appeal dismissed.

Attorney for the appellant : *S. C. Sen.*

Attorney for the respondent : *P. N. Sen.*

J. C.

(1) (1906) I. L. R. 33 Calc. 947. (2) (1863) 1 Mad. H. C. 420

(3) (1895) I. L. R. 18 Mad. 277.

APPELLATE CIVIL.

Before D. Chatterjee and Beachcroft JJ.

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Assessment—Sovereign right—Limitation—Resumption—Right of Government to assess revenue on land alleged to be lakheraj—Divesting of such right, effect of—Bengal Regulation (II of 1805) s. 2, sub-s. 2—Assam Regulation (I of 1886) s. 28, provisos 2 and 4—Legislation, when retrospective.

Though the Government's right to assess land revenue is a sovereign right and hence not subject to the Statute of Limitation under ordinary circumstances, there is nothing to prevent the Government from divesting itself of such right by making regulations for assessment and collection of revenue which might under certain circumstances give exemption from assessment of land revenue.

Boddupalli Jagannadham v. The Secretary of State for India (1) distinguished.

The effect of proviso 4 to s. 28 of the Assam Regulation (I of 1886) which is based on s. 2 of the Bengal Regulation (II of 1805), is to exempt land from assessment if the owner can prove 60 years' possession of it without payment of any revenue during that period and thus to introduce the rule of 60 years' limitation. Proviso 2 of that Regulation merely authorises assessment of lands excepted from the Permanent Settlement if they do not fall under any of the saving clauses.

A statute is not retrospective simply because a part of the requisites for its action is drawn from a time ante cœlum to its passing.

On en v. St. Mary, Whitechapel (2) followed.

*Appeal from Appellate Decree No. 3605 of 1913 against the decree of P. K. Chatterji, Additional District Judge of Sylhet, dated July 10, 1913, affirming the decree of Kalash Chandra Sen, Subordinate Judge of Sylhet, dated May 25, 1912.

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SECOND APPEAL by Ananda Kumar Bhattacharjee,
the plaintiff.

This appeal arose out of a suit brought against the present defendant to have it declared that a plot of land which originally formed a tank, situated in perghana Baniachong in Sylhet, appertained to the plaintiff's rent-free grant and as such was not liable to be assessed for land-revenue by the Government. The plaintiff alleged that his predecessors had been in possession of this plot of land as a part of their *nishkar* property, from before 1793; that the Government never realised any rent nor did they ever assess it with any revenue; that though it was measured in 1839-40 for purposes of revenue, it was released on the plaintiff's predecessors proving their claim; that in the *thakbust* proceedings the Government's *maliki* right over the land was disallowed and that in any case the Government's right to assess had been extinguished under proviso 4 of s. 28 of the Assam Land and Revenue Regulation of 1886 by the plaintiff's uninterrupted user of the land for more than 60 years without payment of any revenue. The defendant, on the other hand, contended that as a matter of fact the Government did assert its right to assess the land with revenue in the re-stumpion suit No. 4496 of 1842, the result of the suit being a decree in favour of the Government declaring the alleged *lakheraj* title of the present plaintiff's predecessor to be an invalid one; that the land was measured, but though the neighbouring homestead lands were assessed, this particular plot was left out because it then formed a tank; that no length of possession could bar the paramount right of the Government to assess land-revenue, and that the Statute of Limitation had no application to such a right of the Government. Both the lower Courts dismissed the plaintiff's claim.

Babu Bipin Behary Ghose (with him *Babu Brajnal Chakravarti*), for the appellant, contended that proviso 4, s. 28 of the Assam Land and Revenue Regulation of 1886 clearly introduced a rule of limitation with regard to the exercise by the Government of its right to assess land revenue fixing the period at 60 years and that the plaintiff had proved adverse possession for upwards of 60 years. It is true that the Government's right to assess revenue is a sovereign right, but there is nothing to prevent it from divesting itself of such a right. The Assam Land and Revenue Regulation of 1886 was based upon the Bengal Regulation II of 1805, sub-section 2 of section 2 of the latter regulation being to the effect that all claims of the Government for assessment of land must be preferred at any time within 60 years from and after the origin of the cause of action. Proviso 2 of the present Regulation is not inconsistent with proviso 4 as the former merely authorises assessment of lands excepted from the Permanent Settlement unless they fall under one of the excepting clauses. Proviso 4 is only one such excepting clause. The application of the Regulation to this case will not amount to giving it a retrospective effect as the proviso merely operates on the state of things that it finds existing on its promulgation, *Queen v. St. Mary, Whitechapel* (1).

The Advocate-General (Mr. G. H. B. Kenrick, K. C.) (with him *Babu Ram Charan Mitra, Senior Government Pleader*), for the respondent, relied on *Boddupalli Jagannadham v. The Secretary of State* (2). The Government's right to assess land-revenue was a sovereign right and no length of possession can bar the permanent right of the Government to assess, the Statute of Limitation having no application to such rights. The application of the Assam Land and

(1) (1842) 12 Q. B. 120.

(2) (1903) I. L. R. 27 Mys. 16.

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Revenue Regulation of 1886 to the present case will amount to giving it a retrospective effect. All legislation is to be considered prospective unless anything to the contrary is expressly or impliedly provided. No such provision is to be found in the Regulation.

Cur. adv. vult.

D. CHATTERJEE J. This was a suit for a declaration that the plaintiff had a revenue-free title to the property in suit and the defendant, the Secretary of State, had no right to assess revenue upon it. Both the Courts below have dismissed the suit and the plaintiff appeals mainly on the grounds (i) that there is no evidence of any resumption decree having been passed in favour of the Government in 1842, and the findings based on the existence of such a decree are bad; (ii) that assuming that there was such a decree or a resumption by the Revenue authorities, no action having been taken upon the same for more than 60 years the right of the Government is barred; (iii) that the plaintiff having held the property without payment of revenue for more than 60 years, no assessment can be made by reason of clause (4) of the proviso to section 28 of the Assam Land and Revenue Regulation I of 1886.

Before discussing these points, I may shortly state the facts that are admitted or found. The disputed property, which was formerly a tank and has now silted up, was owned by certain Mahomedans who in 1806 sold it to the ancestor of the plaintiff; the deed of sale does not state that the property was lakheraj and there is no documentary evidence of a grant in lakheraj right. The defendant admits that Kasba Beniachong, the melah in which the disputed property is situate, was excepted from the Permanent Settlement in 1793 as the then holders of the same claimed a

Iakheraj right. The plaintiff admits that there was a measurement in 1839-40 with a view to resumption. The defendant says there was a resumption suit in 1842 which was decided in favour of Government. Neither the decree nor an attested copy of the same is forthcoming, but there are recitals of a resumption case and decree in a number of papers including a kabuliat by the father of the plaintiff, but not in respect of the disputed land. These documents make out a resumption of the Mahal in 1842, but it does not necessarily follow from that that the disputed land was included in the resumption. Next in point of time is the Thakbust proceeding Ex. 3 produced and proved by the plaintiff. Under the heading number Touji and name of Mahal we find the entry "Non-settled resumed Mahal," and under the heading "the Mahals which have been enclosed by boundaries or plotted" we find No. 170 the disputed property, and under the heading of "Remarks" we find that the name of the Government was originally recorded as the owner in possession, but was removed on the objection of the plaintiff's ancestor whose name was recorded instead. It is contended by the learned Advocate-General that this document being filed by the plaintiff it operates as an admission of the title of the Government in 1861. I do not see how this may be: The description of the Mahal as a resumed Mahal was made by the Thak authorities, and not by the plaintiff or his ancestor. It was not the business of the Thak authorities to decide whether a particular piece of land was resumed or not; they took the name as it was given by the Government Revenue authorities who succeeded in getting an entry as owner in possession, but that entry was expunged on objection by the plaintiff's ancestor. The enclosing by boundaries of the disputed plot also does not show that it

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was resumed, for lakheraj lands were as a matter of fact enclosed by boundaries during the Thak. Even if the description of the Mahal as resumed Mahal could apply to the disputed plot, there is nothing in this to show that it was resumed under a decree of the Civil Court. This is all the evidence that we have of a resumption decree as it is called. I do not see my way to adopt this view and I think the appellant is right in contending that there is no evidence of a resumption decree in 1842 in respect of the disputed land.

There was, however, admittedly an attempt at resumption. The resumption chitta is clear evidence of that and we may take it there was a resumption by the Revenue authorities, *i.e.*, to say a decision by the Revenue Board that the land was assessable to revenue. Section 21, clause (4), Regulation II of 1819 provides that upon such a decision by the Board the duty of the Collector would be to make an assessment after notice to parties, see also section 23, Regulation II of 1819. There is no provision in this Regulation as to the time within which this assessment was to be made. Now this Regulation was modified by section 10 of Regulation III of 1828 which directed the assessment to be made at once and that if the owner declined to pay he must be dispossessed. In the present case there was no immediate assessment and the owner was allowed to continue in possession. It is said that this was so because the land was a tank and unfit for settlement. The learned Judge says this is clear from Exs. V & T. I do not see how this is so. Ex. T describes No. 2532 as a tank and gives its boundaries and Ex. V does not mention 2532 at all. If Ex. T shows anything it shows that the property was a tank which would ordinarily be more valuable than waste land. Then again, the learned Judge says the possession of the

plaintiff was permissive, but that was never the case of the defendant who only said that no assessment was made of tanks, go-paths and waste lands as unfit for settlement and as no one applied for them. The finding of the character of plaintiff's possession therefore is against the case of the defendant and is an inference which, as far as I can see, is not supported by evidence. On the other hand, if the defendant had a right to dispossess the plaintiff in 1812 and did not exercise its right the possession of the plaintiff became adverse to the defendant from that time. That possession continued for more than 60 years and the defendant's right of recovery of possession is lost. It is said, however, that the right to assess revenue is a sovereign right and cannot be lost. Reliance is placed in support of this view on the case of *Boddupalli Jagannadham v. The Secretary of State* (1). With great respect to the learned Judges I do not feel at all pressed by the opinion in that case in favour of a sovereign right of assessment. The particular Madras Regulation XXV of 1802 which was the subject-matter of discussion expressly reserved the right of Government to continue or abolish exemptions from the payment of revenue and no question of prerogative was pertinent. The unreported case relied on by the learned Judges goes perhaps a little further, but there it was stated that "no limitation is placed on the exercise of that right by any statute or law." That was probably so in Madras. In Bengal, however, we find that there is such a statute. Sub-section (2) of section II of Regulation II of 1805 is to the effect that "all claims on the part of the Government, whether for the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption, or for the recovery of arrears of the

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public assessment, or for any other public right whatever (the judicial cognizance which may not have been otherwise limited by some special rule or provision in force) shall be heard, tried and determined, if the same be regularly and duly preferred at any time within the period of 60 years from and after the origin of the cause of action."

The origin of the cause of action was in 1793 at the time of the Permanent Settlement when the predecessors in title of the plaintiff claimed a lakheraj title and the Government had to abstain from making a settlement. If the proceedings of 1842 declared the land liable to assessment the Collector should have proceeded to assess it at once, but he did not. Whether we count 60 years from 1793 or from 1842 the claim of the Government is barred. This disposes of the second question.

The last question argued is that the assessment is barred by section 28 of Assam Regulation I of 1886. That section enacts that all land shall be liable to assessment except lands expressly exempted and lands for which a tax is levied under section 47 : "provided that nothing in this section shall authorise the assessment of any land which has been held revenue-free for 60 years continuously, unless it is shown that the right so to hold it has ceased to exist."

The land in this case has been admittedly held revenue-free for more than 60 years and the Bengal Regulations under which assessments were previously made being repealed by this Regulation as to Assam, and the operation of this section being excluded by the said proviso, there would be no law under which the disputed land could be assessed.

The learned Judge, however, thinks that to apply this section to the present case would be to give a retrospective effect to it and that 60 years have not

elapsed from 1886. It is true that all legislation must be considered as prospective unless anything to the contrary is expressly or by necessary implication provided. But a statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing. See *Queen v. St. Mary, Whitechapel* (1). If the proviso is considered to be an enacting part of the section, which it apparently is not, it operates on the state of things that it finds existing on its promulgation. If it finds that a particular piece of land answers to the description contained in its wording it operates by excluding it from the operation of the enacting part.

But the matter may be looked at from another point of view. The proviso excepts a particular class of lands from the operation of the enacting part of the section. The enacting part therefore does not apply and no retrospective effect is given to any enactment.

In the next place, it may be said that it does not take away or affect any vested right, it declares what the legal position of these lands was at its passing. The limitation regulation had barred the right of assessment in such cases and it was thought proper to add this proviso just for the purpose of preventing misconception and dispute.

The second clause to the proviso might at first sight appear to authorise the assessment of the disputed lands as excepted from the Permanent Settlement.

In construing that clause, however, it must be remembered that the Regulation was originally passed for the Province of Assam, where the Permanent Settlement came very much later where it did come, and in many places it has not come even now, so that it cannot be said that the assessment of lands excepted

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from the Permanent Settlement in 1793 was contemplated in 1886 after more than 93 years. Clause No. 1 of the proviso, therefore, would authorise the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other excepting clauses of the proviso, and in the present case clause 1 has saved them.

CHATTERJEE J. In this view of the case, I would allow the appeal and decree the suit with costs in all Courts in the following manner : that it be declared that the disputed land is not liable to be assessed with revenue and that the Secretary of State be enjoined not to realise the sum claimed in the notice of December, 1908. If the amount has been realised it will be refunded to the plaintiff.

BEACHCROFT J. As regards the first point argued on behalf of the appellant, I am not prepared to say that there is no evidence that the land was resumed in 1842. There is no doubt that there was evidence before the learned Judge that resumption proceedings were taken in respect of the whole of Baniachong, i.e. which area was included the subject-matter of dispute and that this particular piece of land, then a tank, figured in the resumption chitta. Then the learned Judge says "the Rubokari (Ex.V) shows besides that the plaintiff or his father preferred no objection with regard to the disputed tank." It has not been suggested that this is an incorrect statement of the content of the exhibit, nor has it been taken as a ground of appeal that the learned Judge has in this passage misstated the evidence. An extract from this exhibit has been printed. It mentions that objections were made in respect of some lands. But the whole exhibit has not been placed before us, and though in the portion printed there is no mention of this particular

plot, there is no reason to suppose that the portion not printed in some passage to which the learned Judge presumably refers, does not bear out his statement of their contents.

It was urged that as under section 65 of the Evidence Act the only secondary evidence admissible of the contents of a public document is a certified copy and there was no evidence of the contents of the resumption decree. But that rule is obviously subject to the rule that when the original has been destroyed or lost any secondary evidence may be given.

The appeal must, however, in my opinion, succeed on the ground that the assessment complained of is barred by section 28 of the Assam Land and Revenue Regulation, 1886. It is argued for the respondent that the right of Government to assess land-revenue which, as is pointed out in the preambles to Regulations XIX and XXXVII of 1793, is based on the ancient law of the country, can never be barred. As to the position stated in those general terms, it is not necessary to express an opinion. For it is clear that Government can divest itself of the right to assess revenue and can make such regulations for the guidance of its officers as will have the same practical result as a renunciation of the right to assess revenue. Now, the Assam Land and Revenue Regulation has repealed the Bengal Regulations, so far as they apply to territories to which the Regulation has been extended, so the only provisions for assessment of land revenue as extant in Sylhet are those to be found in the Regulation itself. Section 28 provides that all land shall be deemed liable to be assessed to revenue, subject to exceptions in favour of two classes of land, and subject also to certain provisos. Exemption is claimed under the 4th proviso which declares that nothing in the section shall "authorise the assessment

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of any land which has been held revenue-free for 60 years continuously unless it is shown that the right so to hold has ceased to exist." The learned Advocate-General argued that the words "held revenue-free" meant so held "as of right," but he was not prepared to argue that they could not mean merely "held without payment of revenue," apart from any question of the right so to hold the land.

I think that if the former meaning had been intended it would have been expressed in definite terms, and that the meaning to be attached to the words is the alternative one suggested. The proviso then would seem intended to reproduce the rule of 60 years' limitation provided by section 2 of Regulation II of 1805. It is also definitely enacted that the proviso is made inapplicable if it be shown in the case of land so held that the right so to hold it has ceased to exist. The qualification is probably intended to save the land-revenue in cases where at some time the land has been rightly held without payment of revenue within the 60 years. The effect of the proviso appears to be to save the land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within the 60 years there was a cessation of the assessee's right to so hold it. If it were sufficient for Government to show that at any time, even before the 60 years, the owner had no right to hold the land revenue-free or had lost the right, the practical effect of the proviso would be merely to raise a presumption in favour of freedom from assessment after 60 years holding without payment of revenue. If that had been the intention, I think it would have been expressed in simpler language. It seems to be a case of an exception within an exception. So that if in fact there has never been

a right to hold the land revenue-free, the second exception will not apply and the holding of the land without payment of revenue for 60 years will bar the assessment.

I must confess that I express this opinion as to the meaning of the 4th proviso with considerable diffidence in view of the fact that the 2nd proviso contemplates cases of assessment of land which was not included in the assets of an estate at the time of the Permanent Settlement, but I do not see what other construction can be placed upon it.

The learned District Judge favoured the view that the proviso to section 28 could not have retrospective effect, in other words that it could not come into operation till the year 1916. This view was only faintly supported in this Court and does not commend itself to me. There does not appear to be any parallel between this case and the case relied on by the learned Judge.

In the present case, the appellant has held the land for more than 60 years without payment of revenue; it is not shown that he lost the right within the 60 years preceding the suit, in fact it is not shown that he never had the right to hold revenue-free. The result is that the Regulation does not authorise assessment in this case.

I, therefore, agree in allowing the appeal and decreeing the plaintiff's suit.

N. C. S.

Appeal allowed.

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CIVIL RULE.

Before D. Chatterjee and Beachcroft JJ.

ASADALI CHOWDHURY*v.***MAHOMED HOSSAIN CHOWDHURY.***

Common Manager—Application for the appointment of a Common Manager—Appointment of a receiver pending disposal of his application—Bengal Tenancy Act (VIII of 1885) s. 93—Civil Procedure Code (Act V of 1908) s. 141 and O. XL, r. 1.

The terms of O. XL, r. 1 of the Civil Procedure Code of 1908 are wider than the corresponding s. 502 of the Civil Procedure Code of 1882 and do not provide that the appointment of a receiver should be confined to a suit.

An application for the appointment of a Common Manager under s. 93 of the Bengal Tenancy Act is an original proceeding contemplated in s. 141 of the Civil Procedure Code to which the procedure under O. XL, r. 1, seems to be applicable.

Thakur Prasad v. Falirullah (1) followed.

The relief of an aggrieved party to such an order is by way of an appeal and not by an application for revision.

CIVIL RULE obtained by Asadali Chowdhury and others, petitioners.

Disputes having arisen between the petitioners and the opposite party who were their co-sharers, owing to the alleged dismissal of two tahsildars engaged in the common estate, the opposite party made an application to the District Judge of Backergunge for the appointment of a Common Manager under section 93 of the Bengal Tenancy Act. The learned Judge ordered the appointment of a receiver pending the

* Civil Rule No. 28 of 1916 against the order of P. L. Cammado, District Judge of Backergunge, dated Jan. 4, 1916.

(1) (1894) I. L. R. 17 All. 106.

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disposal of the application. Against this order, the petitioners obtained this Rule on the ground that it was passed without jurisdiction and without notice to them.

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Maulvi Nuruddin Ahmed, for the petitioners, contended that a receiver can only be appointed in a suit and not in a proceeding in the nature of an application under section 93 of the Bengal Tenancy Act. Besides, want of notice to the parties with regard to any order passed by a Civil Court makes that order irregular.

Babu Jogendra Nath Mookerjee, for the opposite party, in showing cause, submitted that proceedings under section 93 of the Bengal Tenancy Act were proceedings which came within the operation of section 141 of the Civil Procedure Code. They were proceedings in the nature of a suit. They were initiated by an application and their termination resembled the hearing and termination of an ordinary suit. Moreover, the wording of Order XL, r. 1, is wider than that of the corresponding section 593 of the old Code which contained the words "subject of a suit" which have been omitted in the present Code. Hence the Judge had jurisdiction to pass the order.

D. CHATTERJEE AND BEACHCROFT JJ. Pending an application for the appointment of a Common Manager under the Bengal Tenancy Act the learned District Judge appointed a receiver. This Rule was issued upon an application by the petitioner that the order made by the learned District Judge was without jurisdiction in that it was made not in the course of a suit, and, secondly, it was irregular because it was made without notice to the petitioner. We have heard the learned vakeels on both sides and we think that the Rule must be discharged.

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With regard to the first ground it is contended that a receiver can be appointed only in a suit and not in a proceeding of this kind. Order XL, rule 1, however, does not provide that the appointment of a receiver should be confined to a suit. The old section 503 of the Civil Procedure Code of 1882 did certainly speak of the appointment of a receiver in a suit, but rule 1 of Order XL of the present Code has left out the words "subject-matter of a suit" and is very general.

Then section 141 is also very general and does seem to apply the procedure under Order XL, rule 1, to proceedings of this kind. That section provides "The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of Civil jurisdiction." It has been held in the case of *Thakur Prasid v. Fakirullah* (1), by their Lordships of the Judicial Committee, that the old section 647 in place of which stands the present section 141 was applicable to the original proceedings in the nature of suits such as guardianship, probate, etc. The present proceeding is an original proceeding which may be said to be in the nature of a suit because it is initiated by an application by one party, is opposed by another and is determined by a final order. The proceedings, therefore, being proceedings in a case which may be said to be in the nature of a suit are such as evidently attract the application of Order XL, rule 1. We think that under Order XL, rule 1, the Court has jurisdiction to appoint a receiver in a case of this kind if, upon the facts before it, it thinks that it is just and convenient that it should make an order under that rule.

Then as regards the question of notice, although an order is generally made by a Civil Court upon notice

to the parties concerned, there may be cases in which the issue of notice may so delay the proceedings as to defeat the object of the order made, and the Court has to pass an order without previous notice in cases of emergency, leaving the party aggrieved to object to it either in the Court making the order or by way of an appeal to a higher Court. These two grounds, therefore, fail. We find that the proceedings for the appointment of a Common Manager have been postponed pending the decision of this Rule. It was not meant that this should be so.

The petitioner, it seems, upon the view we take of Order XL, rule 1, misconceived his remedy as he should have come to this Court by way of an appeal against the order appointing the receiver.

We discharge this Rule with costs and direct that the record be sent down at once so that the proceedings for the appointment of a Common Manager may be continued without further delay.

N. C. S.

Rule discharged.

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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Specific Performance—Agreement to sell decree and rights appertaining thereto and to transfer it to defendant—Vendor and Purchaser—Decree becoming barred by limitation before assignment—Obligation to keep decree on vendor—Civil Procedure Code (Act XIV of 1882) s. 232—Transfer of decree.

The plaintiffs (respondents) brought a suit for specific performance of an agreement made between them and the defendant (appellant) by which the latter contracted to purchase a mortgage decree and all rights appertaining thereto, which decree was to be duly transferred to the defendant, which by reason of section 232 of the Civil Procedure Code, 1882, could only be done by an assignment in writing. The decree, however, before assignment became barred by limitation, and he refused to take it.

Held (reversing the decision of the appellate High Court), that what the plaintiffs had agreed to assign to the defendant was a decree capable of execution; that until assignment there was an obligation on the plaintiffs as vendors to keep the decree alive; and that therefore when the decree became barred by limitation the plaintiffs were asking for specific performance by the defendant of an agreement which they were themselves unable to perform, and no such relief could be granted.

Wolverhampton and Walsall Railway Co. v. L. & N.W. Railway Co. (1), per Lord Selborne, referred to.

APPEAL 84 of 1914 from a judgment and decree (1st March, 1909) of the High Court at Calcutta in its appellate jurisdiction, which reversed a judgment and decree of a Judge of the same Court (6th April, 1908) in the exercise of its ordinary original civil jurisdiction.

^a Present: LORD SHAW, SIR JOHN EDGE, AND SIR LAWRENCE JENKINS

(1) (1873) L. R. 16 Eq. 433, 439.

Some of the defendants were appellants to His Majesty in Council.

The question for decision on this appeal was whether the plaintiffs respondents were entitled to a decree for specific performance of a contract dated 20th June, 1895 which had been decided in their favour by the appellate judgment of the High Court (SIR FRANCIS MACLEAN C.J. and HARRINGTON and FLETCHER J.J.) which reversed the decision of CHITTY J. who dismissed the suit.

The agreement of which specific performance was sought was dated 21st June, 1895 and made between the executors and executrix of one Lala Bangsa Gopal Nandy and Trailokya Nath Bose (now represented by the appellants), by which Trailokya Nath agreed to purchase for Rs. 19,000 a mortgage decree passed by the Court of the Subordinate Judge of Monghyr in Suit 87 of 1892. The present suit was filed on 20th June, 1898, the original plaintiffs being the six sons of Lala Bangsa Gopal of whom the eldest Nirmal Prokash Nandy alone had attained majority; the other five suing by their next friend, Karuna Nidhan Mukherji. On the death of Nirmal, his widow and administratrix was put on the record in his place. The original defendants were Trailokya Nath Bose and Bhupendra Nath Bose. The former died in 1906 and his four infant sons were substituted for him as defendants.

The facts of the case are sufficiently stated in the judgment appealed from, which was as follows:—

"One Nursingh Prokash Mitter was the owner of certain properties in Durbhanga and Monghyr. In 1877 Nursingh mortgaged his Durbhanga property to M. J. Wilson by three deeds dated respectively the 2nd February, 3rd April, and 25th April, for sums amounting in the aggregate to Rs. 60,000. Nursingh subsequently mortgaged the Durbhanga property to Messrs. MacIver; the details of this mortgage do not appear, but in 1895 the amount due on it was about Rs. 10,000. On 14th April, 1890

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Nursinghi executed two mortgages of his Durbhanga and Monghyr properties together in favour of Lala Bangsa Gopal Nandy for sums aggregating Rs. 18,000.

On 27th January, 1891 Nursinghi mortgaged the Durbhanga and Monghyr properties to Bhupendra Nath Bose for Rs. 2,000. In 1892 Bangsa Gopal Nandy filed a suit to enforce his mortgages in the Court of the Subordinate Judge of Monghyr. Bangsa Gopal Nandy died on 26th December, 1892 having by his will appointed his widow Srimati Kanchan Dai Debi, Sajani Kanta Chatterji, Jagat Bandhu Mitter and Ram Lal Mukerji to be the executors thereof.

Ram Lal Mukerji renounced probate of the will and Srimati Kanchan Dai Debi died before the grant of probate. Ultimately on the 20th August, 1893, probate of Bangsa Gopal Nandy's will was granted by the District Judge at Burdwan to Sajani Kanta Chatterji, Jagat Bandhu Mitter and the Maharani of Burdwan who is stated to have been substituted as an executrix for the testator's widow. In the meantime Sajani Kanta Chatterji and Jagat Bandhu Mitter had been appointed administrators *pendente lite* of the estate of the deceased Bangsa Gopal and on the 28th July, 1893 a mortgage decree for Rs. 21,588-15 had been passed in their favour in the suit filed by the deceased Bangsa Gopal. Bhupendra Nath Bose had also filed a suit on his mortgage and obtained the usual mortgage decree on the 19th June, 1893.

On the 13th January, 1894 Bhupendra Nath Bose obtained an order for sale of the Durbhanga property comprised in his decree and at the sale in execution of the decree on the 20th June, 1894 he purchased the property.

On the 27th June, 1894 Wilson obtained from the Mozafferpore Court a decree on his three mortgages and on the 27th February, 1895 Wilson obtained an order for the sale of the Durbhanga property in execution of his decree.

The 21st June, 1895 was fixed for the sale of the Durbhanga property in execution of Wilson's decree.

"The amounts then due to the respective mortgagees were as follows —

(i) to Wilson about Rs. 77,000, (ii) to MacIver about Rs. 10,000, (iii) to the executors of Bangsa Gopal Nandy about Rs. 28,000

"It appears that the Durbhanga property is of considerable value. It was known that Trailokya Nath Bose intended to try and secure the property at the sale for himself and his brother Bhupendra and Upendra

"The executors were in a state of much anxiety as to the sum of Rs. 28,000 due to their testator's estate and eventually they determined to bid at the sale up to an amount which would at any rate cover their decree. Accordingly they despatched their Dewan to Mozafferpore with Rs. 35,000,

which sum would be sufficient to pay a deposit on a sale price of Rs. 1,40,000.

"Now it is obvious if Trailokya Nath Bose wished to acquire the Durbhanga properties at the sale at a favourable price it was essential that he should come to terms with the executors of Banga Gopal who were the only other intending bidders.

"Accordingly on the arrival of the Dewan Trailokya Nath entered into negotiations with him. The first proposal by Trailokya Nath was that he should purchase the executor's decree so far as it related to the Durbhanga properties for Rs. 10,000. As Trailokya Nath was intending to purchase the property at a sale under a first mortgage it is obvious that this offer was made with intent to induce the executors to refrain from bidding at the sale. This offer was refused by the Dewan. Further negotiations took place and ultimately on the 20th June, 1895 an agreement was entered into by which Trailokya Nath agreed to purchase the executor's decree for the sum of Rs. 19,000, and this is the agreement which is sought to be enforced in this suit.

"It appears that the value of the Monghyr properties was very small, the value being placed somewhere between Rs. 2,000 to Rs. 5,000, and there can be little doubt that the main object of the agreement of the 20th June, 1895 was to induce the executors to refrain from bidding at the sale.

"On the 21st June, 1895 Trailokya purchased the Durbhanga properties at the sale for Rs. 77,517, being only Rs. 517 above what was found due to the first mortgagee. So that by reason of his agreement he was able to purchase the property at a figure far below what he would have had to give if the executors had entered into competition with him.

"After the purchase by Trailokya Nath, difficulties seem to have arisen with the Maharani of Burdwan as to her executing the proposed assignment to Trailokya Nath. The Maharani claimed that a certain sum of Rs. 1,046-13 which had been received by the executors as representing a portion of the Monghyr properties which had been sold for arrears of revenue after the claims of the Government had been satisfied should not be deducted from the purchase-money. The other executors were willing to assent to Trailokya Nath's request as to this, but the Maharani declined. The other two executors, who were the actual decree-holders, offered to execute to Trailokya Nath an assignment which would have apparently given Trailokya Nath a good title to the decree. Trailokya, however, refused to accept this. On the 8th May, 1897 the other executors wrote to Trailokya Nath that the Maharani was willing to join in the assignment.

"Thereupon Trailokya Nath began to raise various further objections. It appears to us from the correspondence that Trailokya Nath having purchased the Durbhanga properties was not anxious to complete his agreement

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Nursingh executed two mortgages of his Durbhanga and Monghyr properties together in favour of Lala Banga Gopal Nandy for sums aggregating Rs. 18,000.

On 27th January, 1891 Nursingh mortgaged the Durbhanga and Monghyr properties to Bhupendra Nath Bose for Rs. 2,000. In 1892 Banga Gopal Nandy filed a suit to enforce his mortgages in the Court of the Subordinate Judge of Monghyr. Banga Gopal Nandy died on 26th December, 1892 having by his will appointed his widow Srimati Kanchan Dai Debi, Sajani Kanta Chatterji, Jagat Bandhu Mitter and Ram Lal Mukerji to be the executors thereof.

Ram Lal Mukerji renounced probate of the will and Srimati Kanchan Dai Debi died before the grant of probate. Ultimately on the 20th August, 1893, probate of Banga Gopal Nandy's will was granted by the District Judge at Burdwan to Sajani Kanta Chatterji, Jagat Bandhu Mitter and the Maharani of Burdwan who is stated to have been substituted as an executrix for the testator's widow. In the meantime Sajani Kanta Chatterji and Jagat Bandhu Mitter had been appointed administrators *pendente lite* of the estate of the deceased Banga Gopal and on the 28th July, 1893 a mortgage decree for Rs. 21,588-15 had been passed in their favour in the suit filed by the deceased Banga Gopal. Bhupendra Nath Bose had also filed a suit on his mortgage and obtained the usual mortgage decree on the 19th June, 1893.

On the 13th January, 1894 Bhupendra Nath Bose obtained an order for sale of the Durbhanga property comprised in his decree and at the sale in execution of the decree on the 20th June, 1894 he purchased the property.

On the 27th June, 1894 Wilson obtained from the Mozaffarpore Court a decree on his three mortgages and on the 27th February, 1895 Wilson obtained an order for the sale of the Durbhanga property in execution of his decree.

The 21st June, 1895 was fixed for the sale of the Durbhanga property in execution of Wilson's decree.

"The amounts then due to the respective mortgagees were as follows :—

(i) to Wilson about Rs. 77,000, (ii) to MacIver about Rs. 10,000, (iii) to the executors of Banga Gopal Nandy about Rs. 28,000.

"It appears that the Durbhanga property is of considerable value. It was known that Trulokya Nath Bose intended to try and secure the property at the sale for himself and his brothers Bhupendra and Upendra.

"The executors were in a state of much anxiety as to the sum of Rs. 28,000 due to their testator's estate and eventually they determined to bid at the sale up to an amount which would at any rate cover their decree. Accordingly they despatched their Dewan to Mozaffarpore with Rs. 35,000,

which sum would be sufficient to pay a deposit on a sale price of Rs. 1,40,000.

"Now it is obvious if Trailokya Nath Bose wished to acquire the Durbhanga properties at the sale at a favourable price it was essential that he should come to terms with the executors of Banga Gopal who were the only other intending bidders.

"Accordingly on the arrival of the Dewan, Trailokya Nath entered into negotiations with him. The first proposal by Trailokya Nath was that he should purchase the executor's decree so far as it related to the Durbhanga properties for Rs. 10,000. As Trailokya Nath was intending to purchase the property at a sale under a first mortgage it is obvious that this offer was made with intent to induce the executors to refrain from bidding at the sale. This offer was refused by the Dewan. Further negotiations took place and ultimately on the 20th June, 1895 an agreement was entered into by which Trailokya Nath agreed to purchase the executor's decree for the sum of Rs. 10,000, and this is the agreement which is sought to be enforced in this suit.

"It appears that the value of the Monghyr properties was very small, the value being placed somewhere between Rs. 2,000 to Rs. 5,000, and there can be little doubt that the main object of the agreement of the 20th June, 1895 was to induce the executors to refrain from bidding at the sale.

"On the 21st June, 1895 Trailokya purchased the Durbhanga properties at the sale for Rs. 77,517, being only Rs 517 above what was found due to the first mortgagee. So that by reason of his agreement he was able to purchase the property at a figure far below what he would have had to give if the executors had entered into competition with him.

"After the purchase by Trailokya Nath, difficulties seem to have arisen with the Maharani of Burdwan as to her executing the proposed assignment to Trailokya Nath. The Maharani claimed that a certain sum of Rs 1,046-13 which had been received by the executors as representing a portion of the Monghyr properties which had been sold for arrears of revenue after the claims of the Government had been satisfied should not be deducted from the purchase-money. The other executors were willing to assent to Trailokya Nath's request as to this, but the Maharani declined. The other two executors, who were the actual decree-holders, offered to execute to Trailokya Nath an assignment which would have apparently given Trailokya Nath a good title to the decree. Trailokya, however, refused to accept this. On the 8th May, 1897 the other executors wrote to Trailokya Nath that the Maharani was willing to join in the assignment.

"Thereupon Trailokya Nath began to raise various further objections. It appears to us from the correspondence that Trailokya Nath having purchased the Durbhanga properties was not anxious to complete his agreement

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to purchase the executors' decree. On the 8th June, 1898 Trilokya Nath was written to and informed that the decree would become barred on the 20th June. Trilokya Nath's answer to this letter was evasive. The executors being in this difficulty applied to the Court to execute the decree. This application was opposed by Trilokya Nath and ultimately it was held on appeal to this Court that the decree was barred by limitation. The present suit was filed on the 20th of June, 1898 for the purpose of enforcing specific performance of the agreement for sale of the decree and came on for hearing before Chitty J. On the 6th April, 1908 the learned Judge gave judgment for the defendants on the ground that the decree had become barred by limitation. We are unable to agree with this judgment.

"The learned Judge held that upon the agreement for sale the vendors did not become trustees for the purchaser and that the risk of the destruction of the property agreed to be sold was with the vendors until actual payment of the purchase price.

"In our opinion, after the execution of the contract the vendors did become trustees for the purchaser and the decree in equity became the property of the purchaser subject to his obligation to pay the purchase price. Moreover, the learned Judge has ignored the fact that the application to execute the decree was opposed by Trilokya Nath.

"We think it would be lamentable in these circumstances to allow this suit to fail simply by reason of the fact that the decree cannot now be enforced against the Monghyr properties which are of very small value.

"There can be no doubt that the agreement was entered into by the defendant in order to induce the executors to abstain from bidding at the sale of the Durbhanga properties, and on the faith of the agreement the executors did abstain from bidding. Certainly since the 8th May, 1897 the executors were not in default and it cannot be doubted that if Trilokya Nath had asked the executors to take any step to keep the decree on foot they would have done so. They owed no further duty to the purchaser.

"Trilokya Nath has had the benefit of the real and substantial part of the agreement, and it seems to us that if he had accepted the assignment in May, 1897 when the Maharani offered to join, he would have got a perfectly good decree against the Monghyr properties which, as we have already said, are of very small value. We think therefore that Trilokya Nath was not entitled to evade the agreement on the ground that the decree has become barred with respect to the Monghyr properties, the more especially so when he induced the executors to refrain from bidding at the sale on the faith of the agreement.

"There is, however, one matter which has not been argued before us or in the Court of first instance, namely, that the executors of Bangsa Gopal are necessary parties to this suit. This suit has been brought by the heirs

of Banga Gopal. The contract is, however, entered into by the executors of his will, and they ought to have been the plaintiffs.

"In these circumstances the record must be amended by adding the executors as co-plaintiffs, and subject to that being done there must be a decree for specific performance of the agreement as against the heir of Trailokya Nath Bose. It is not denied that the defendants are entitled to a reduction of the purchase money in respect of the sum of Rs. 1,046-13 received by the executors from the Monghyr Court. This appeal must therefore be allowed with costs both here and in the Court of first instance."

On this appeal,

DeGruyther, K.C., and *Sir William Garth*, for the appellants, contended that on the facts and circumstances of the case neither the executors and executrix, nor the original plaintiffs were entitled to specific performance of the contract for the purchase of the decree. The agreement was for a decree capable of being executed, and therefore as soon as it was held that the decree was barred by limitation the appellants were entitled to refuse to perform the agreement. The mere making of the contract did not, on the express terms of section 54 of the Transfer of Property Act (IV of 1882), pass any interest in the decree to the purchaser; it had to be assigned to him by a transfer in writing. See section 232 of the Civil Procedure Code, 1882. Until it was so assigned therefore the obligation was on the vendors to keep the decree alive, and they did not fulfil that obligation. Until assignment the only persons who could have applied for execution of the decree were the executors in whom the decree vested under the grant of probate. According to the English cases the moment there was a "valid contract" for sale, the vendor became in equity trustee for the purchaser. A "valid contract" changes the ownership of the subject of sale in equity, and there is a correlative liability on the vendor with regard to his obligations in respect of the property

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sold. Reference was made to Lewin on Trusts (12th Ed.) 162, and the statement of law there made and the cases referred to, of which *Lysaght v. Edwards* (1) per Sir G. Jessel, M.R., and *Wilson v. Clapham* (2), were cited. If a decree is "immoveable property" section 54 of the Transfer of Property Act was applicable, or if "movable property" then sections 130 and 131 of the same Act would apply. The decree would not pass until transferred as stipulated by a registered deed. The Appellate Court should in its discretion have refused to grant specific performance, and should have affirmed the decision of the first Court which, it was submitted, was correct.

[Their Lordships said they were satisfied as to the contract to sell, but not as to the assignment of the decree.]

Sir Erle Richards, K.C., and *A. M. Dunne*, for the plaintiffs respondents, contended that the obligation to keep alive the decree was on the appellant as the purchaser and therefore the only beneficial owner of the property sold; he was the only person who could redeem the mortgages on it. Reference was made to cases of which the chief was *Rayner v. Preston* (3), decided by Sir G. Jessel, M.R., the principles laid down in which were, it was submitted, applicable. The words in section 54 of the Transfer of Property Act, "the contract of itself does not create any interest" did not refer to the equitable interest or charge. The events which had occurred since the contract were not of such a character as to relieve the purchaser of his obligation with respect to the property. He really bought the decree to get rid of the competition of these respondents at the sale, and not with any idea of enforcing it against the Durbhangas.

(1) (1876) L.R. 2 Ch. D. 499, 506. (3) (1880) L.R. 14 Ch. D. 297, 303:
 (2) (1819) 1 Jac. & W. 36, 38. affirmed (1881) 18 Ch. D. 1.

property, concerning which it was comparatively valueless after the sale under Wilson's decree. These respondents were parties to Wilson's suit and therefore bound by that sale. Since 1897 the executors and executrix were ready and willing to make the assignment to Trailokhya Nath. The decree, it was submitted, became on the making of the contract the property of the purchaser, subject to his obligation to pay the purchase money, and there was no obligation on the executors to keep the decree alive, though probably they would have done so on his request; and he was not entitled to refuse to perform the agreement on that ground. The High Court in the decision now appealed from had rightly exercised the discretion given to it in the Specific Relief Act in favour of these respondents. Reference was made to the portions of the Act which allowed specific performance of part of a contract, as section 13 (a) and (b) which enacted that "notwithstanding section 56 of the Contract Act" (making void a contract to do an impossible act) "a contract is not wholly impossible of performance because a portion of it existing at its date has ceased to exist at the date of its performance;" section 14 ("where part of it which cannot be performed is small specific performance can be granted with compensation for the small part"), and section 19 ("where a person suing for specific performance may ask for compensation either in addition to or in substitution for that relief"). As to the decree being moveable or immoveable property, reference was made to section 76 of the Contract Act, where "goods" means any kind of moveable property, section 86 (where goods have become the property of the buyer, he must bear any loss arising from damage to them), and the General Clauses Consolidation Act (I of 1897), section 3 (34). This cannot be considered other than being a question

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as to immoveable property. Section 93 of the Contract Act, section 55 of the Transfer of Property Act, and the case of *Holroyd v. Marshall* (1) were also referred to.

DeGruyther, K.C., replied referring to *Mudraj Khatau v. Vishwanath Prabhuram Paidya* (2), and distinguishing the case of *Holroyd v. Marshall* (1) as being contrary to section 54 of the Transfer of Property Act, and therefore inapplicable.

The judgment of their Lordships was delivered by
March 28.

SIR JOHN EDGE. This is an appeal from the decree, dated the 1st March, 1909, of the High Court at Calcutta, which in appeal set aside the decree, dated the 6th April, 1908, of Mr. Justice Chitty, who had tried the suit under the Original Jurisdiction of that Court.

The suit was brought to obtain a decree for the specific performance of an agreement, dated the 21st June, 1895, by which the original defendant Trailokya Nath Bose, now deceased, had agreed to purchase from the executors and the executrix (hereinafter referred to as the executors) of Lala Bangsa Gopal Nandy for the price of 19,000 rupees a decree and all the rights appertaining thereto which the said executors had obtained on the 17th July, 1893, against Pandit Nursingha Prokash Misser on a mortgage. Mr. Justice Chitty dismissed the suit. The High Court in appeal made a decree for specific performance.

The appeal has been argued at considerable length, but the material facts upon which the suit and this appeal depend may be briefly stated. The decree which it was agreed that the executors should assign to Trailokya Nath Bose was a decree for sale of certain

(1) (1862) 10 H. L. C. 191.

(2) (1912) I. L. R. 37 Bom. 198;
I. R. 40 I. A. 24.

immovable hypothecated properties, which could also in certain events be executed against the person and other property of the defendant to the suit in which it was made. Owing to the bar of limitation the decree for sale became incapable of execution on the 1st June, 1898, and thereupon Trailokya Nath Bose refused to pay the agreed price and to take an assignment of the decree, hence this suit for specific performance.

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The agreement of which it is sought to obtain specific performance was an executory agreement for the completion of which something remained to be done in order to put the parties in a position relative to each other in which, by the preliminary agreement of the 21st June, 1895, they were intended to be placed. As was pointed out by Lord Selborne, L.C., in *Wolverhampton and Walsall Railway Company v. London and North-Western Railway Company* (1), "the expression 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be placed." In this case what remained to be done was, on payment by Trailokya Nath Bose of the agreed price, the transference to him of the decree for sale of the 17th July, 1893. Such a transfer of the decree to Trailokya Nath Bose could, by reason of section 232 of the Code of Civil Procedure, 1882, be effected only by an assignment in writing. On and after the 1st June, 1898, the decree, as a decree capable of being executed, could not by reason of the bar of limitation be assigned to Trailokya Nath Bose. It had become a dead decree; whereas the decree, whatever might

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be its value, which he had agreed to purchase, and which the executors had agreed to assign to him, was a decree capable of execution.

It has been contended on behalf of the respondents to this appeal that it was the duty of Trailokya Nath Bose, and was not the duty of the executors, to keep the decree alive after the 21st June, 1895. That is a contention which, in their Lordships' opinion, cannot be maintained. As the decree had not been transferred by an assignment in writing to Trailokya Nath Bose, he could not by any application to the Court have kept the decree alive.

The respondents are asking for a decree for the specific performance of an agreement which they, on their part, are unable to perform. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court in appeal should be set aside with costs, and the decree of Mr. Justice Chitty should be restored.

The plaintiff respondents must pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellants : *G. C. Farr.*

Solicitors for the plaintiffs respondents: *Watkins & Hunter.*

J. V. W.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J., Woodroffe and Mookerjee JJ.

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C. R. SCRIVEN AND OTHERS.*

Ex parte Decree—Decree without evidence—Practice and Procedure—Unliquidated damages—Undefended suit—Defendant appearing at the trial—Leave to defend refused—Non-denial of claim, effect of—Verification of plaint—Civil Procedure Code (Act V of 1908) O. VIII, rr. 3, 5; O. IX, r. 6; O. XVIII, r. 2; O. XIX; and O. XXXVII.

The plaintiffs entered into a contract with the defendants for the sale of certain goods and upon the defendants failing to deliver the same within the time specified in the contract, they brought a suit for breach of contract and claimed as damages the difference between the contract price of the goods and the market price thereof. The defendant did not enter appearance nor did they file a written statement, and the suit was in due course transferred to the list of undefended causes. On the date of hearing of the case, the defendants applied for leave to defend the suit on the ground that their attorneys had misunderstood their instructions to them to appear and defend the suit. The Court, however, refused the application and, without hearing any evidence whatsoever other than reading the affidavit of service of summons, decreed the plaintiffs' suit *ex parte*.

Held, that it would be undesirable if a suit such as this were adjudicated upon without any evidence in the real sense of the word, given by the plaintiffs where the claim was for unliquidated damages, and that the learned Judge had no jurisdiction to make the decree, which in fact he did.

Held, also, that O. VIII, r. 5 of the Code did not apply to a case where the defendant had not put in a written statement.

Held, also, that the verification of the plaint was not evidence on which a suit could be decided whether the adversary did or did not appear.

Basdeo v. John Smith (1) referred to

* Appeal from Original Civil, No. 40 of 1916 in suit No. 124 of 1916.

(1) (1899) I. L. R. 22 All 55.

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Held, further, that there was no legal evidence on the record on which the decrees made in favour of the plaintiffs might be supported, and that the plaintiffs were not entitled to succeed on the basis of an implied admission of their claim by the defendants.

Per SANDERSON C. J. The fundamental principle is that the plaintiff, when he comes to Court, must prove his case and must prove it to the satisfaction of the Court.

Per WOODROFFE J. No decree can be legally given in any case without evidence, except in cases of suits governed by the provisions of O. XXXVII of the Civil Procedure Code.

In this Court it has always been the practice in undefended cases to take evidence, as defined in the Evidence Act, namely, oral statement of witnesses and documents proved before the Court. The *cursus curia* may be looked at when interpreting the terms of the Civil Procedure Code.

Galstaun v. Hatchison (1) referred to.

Per MOOKERJEE J. Great caution should be exercised when suits are heard *ex parte*. This observation is of universal application. But it applies with special force to cases where unliquidated damages are claimed on the allegation that there has been a breach of contract.

Amritnath Jha v. Dhanpat Singh (2) referred to.

APPEAL by J. B. Ross & Co., the defendants, from the judgment of Fletcher J.

On the 21st December, 1914, Messrs. Scriven Bros. & Co. entered into a contract with the defendants to purchase 400 tons of Madras ground-nut kernels, the terms of the contract being, *inter alia*, "shipments 200 tons in January, 1915 and 200 tons in February, 1915." Upon the defendants failing to deliver the said goods within the periods specified in the contract, Scriven Bros. & Co. brought a suit for breach of contract against them and claimed the sum of Rs. 17,578-13-8 from them as damages, being the difference between the contract price of the said goods and the market price thereof on the 31st January, 1915 and the 28th February, 1915, respectively, and for interest. On the 24th January, 1916, the plaintiffs' suit was filed in the High Court and on the 10th February, 1916, the writ

(1) (1912) I. L. R. 39 Calc. 789

(2) (1871) 8 B. L. R. 44.

of summons was served on one of the partners of the defendant company. The defendants did not enter appearance on the date specified in the summons, nor did they put in a written statement within the time mentioned in the summons. Thereupon, the suit was transferred to the list of undefended causes. On the 13th March, 1916, when the suit came on for hearing before Mr. Justice Fletcher, the defendants applied through their counsel, Mr. G. M. Gregory, for leave to appear and defend the suit, and alleged in support of their application that the person representing the defendant company had been away out of Calcutta and had sent a telegram to their attorneys, Messrs. Pugh & Co., instructing them to proceed in the suit, but that these instructions owing to the mutilation of the telegram by the Telegraph office had been misunderstood by the attorneys, who thought they had no instructions to appear, and that, consequently, no steps had been taken to defend the suit. The Court refused the application and without hearing any evidence whatsoever, other than reading the affidavit of service, gave judgment "for amount claimed, 6 per cent. on decree. Costs on scale No. 1." From this judgment the defendants appealed.

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Mr. J. W. Langford James (with him *Mr. D. C. Ghose*), for the appellants. Under the Civil Procedure Code the only class of suits in which a decree could be made without hearing evidence was that provided for by O. XXXVII, which was analogous to O. XIV of the Rules of the Supreme Court of England. In all other cases evidence must be given by the plaintiff to prove his claim. The present case did not fall under the class of suits provided for by O. XXXVII. The decree in it, therefore, could be made only after the Court had taken evidence. The ordinary writ of

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summons clearly provided that the suit would be heard and determined in the defendant's absence, whereas the writ of summons in the case of suits under O. XXXVII provided that the plaintiff would be entitled to a decree. O. VIII, r. 5, had no application to the present case. This order dealt with specific denials of facts in the plaint on the assumption that there were pleadings, i.e., plaint and written statement. The same criticism applied to s. 58 of the Evidence Act. If O. VIII, r. 5, were to apply, then undefended suits would be unnecessary and the plaintiff would merely have to apply for judgment under O. XII, r. 6. O. IX, r. 6 set out the procedure in cases where only the plaintiff appeared and O. XVIII, r. 4, dealt with the examination of witnesses in open Court. No question could be raised as to the plaint being evidence in the suit, inasmuch as the verification of a plaint was not an affidavit. At all events the verification in the present case did not conform to the provisions of O. XIX, r. 3. O. XXXVII reproduced the R. S. C., O. III, r. 6, read with the R. S. C., O. XIII, r. 3. The practice in this Court had invariably been to take evidence in undefended cases, *Jonardan Dobey v. Ramdhone Singh* (1) and *Amritnath Jha v. Dhunpat Singh* (2). In *Galstaun v. Hutchison* (3), though nothing appeared in the report, this question was mooted, but the Court refused to entertain the argument. O. VIII, r. 5, obviously could not apply to allegations as regards damages. See also O. VIII, r. 3. The plaintiffs in the present case had come to Court and elected to take a particular course. It was not stated by them that they had evidence to offer and were prepared to tender that evidence. They merely gave no evidence. Having so elected not to

(1) (1896) I. L. R. 23 Calc. 738. (2) (1871) 8 R. L. R. 44.

(3) (1912) I. L. R. 39 Calc. 789.

give evidence, this suit should have been dismissed.
See Woodroffe and Amir Ali's Code of Civil Procedure,
p. 1262.

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Mr. P. L. Buckland, for the respondents. There was no such election. It was true that no oral evidence was offered, but that was because Mr. Justice Fletcher's practice in undefended cases other than matrimonial cases was to give judgment without evidence. Two questions were involved in the present case, *first*, whether a written statement having been filed or not, a claim if not denied could be taken as admitted and if it could not be taken as admitted; *secondly*, whether a plaint verified as required by the law was evidence upon which a decree might be founded. The procedure followed in this suit, though novel and recent, was not, therefore, necessarily illegal. In the absence of a written statement the allegations in the plaint in suit must be taken as admitted under O. VIII, r. 5, of the Code. It could not be urged that the position of the defendants in this respect was improved simply because they did not appear. O. VIII, r. 5, meant that damages must be pleaded, but that there was no need to deal specifically with them. Until denied, at least generally, some damages were due, if only nominal, for breach of the contract. There was nothing in the Civil Procedure Code which corresponded to the rules of the Supreme Court of England, O. XXVII, r. 4. O. VIII, r. 3, of the Code was not inconsistent with O. VIII, r. 5. It was illogical to say that the Court did not regard the statements in the plaint as admitted if no written statement was filed, though it might possibly do so after a written statement was filed. Everything must be taken to be admitted until it was denied. Admissions did not spring from the moment there was a failure to deny. See O. XV, r. 1, of the Code.

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Ross & Co. Where there was no written statement, the parties were not at issue. It was necessary that there was a written statement before issues were raised. The practice was that when a plaint was admitted a written statement was directed to be filed within a specified time. See O. VIII, r. 1, of the Code. Therefore, until there was a denial, there could be no issue. The Court would hear evidence only where there was an issue. The practice of putting down cases for settlement of issues was not a practice ordinarily resorted to in this Court. Therefore, omitting this stage, the next was O. XIV, r. 1, of the Code. Then the Court might under O. XV pronounce judgment. Therefore, the practice of Mr. Justice Fletcher was strictly justified. As to whether this procedure was desirable or not, or whether it met the ends of justice or not, was quite a different matter. Strictly and technically, on this order the Court could give a decree.

If, however, the contentions as to O. VIII, r. 5, were not correct and evidence must nevertheless be given in support of the plaintiffs' claim, the plaint signed and verified in accordance with O. VI, rr. 14 and 15, of the Code afforded such evidence. The question of proof was dealt with by the Evidence Act. The object of verification was to give the Court some guarantee of authenticity and the *bona fides* of the claim. Plaints in this country had a very much higher value than a statement of claim in England. If a plaintiff made a false verification he was liable under s. 153 of the Indian Penal Code for giving false evidence. See *Queen-Empress v. Mehrban Singh* (1). A verified pleading, therefore, was evidence. Where the plaintiff did not state the truth in his plaint he was liable for giving false evidence. It would be an absurdity to say that where he is speaking the truth he is not

giving any evidence, but where he falsely verifies his plaint he is liable to punishment for giving false evidence. The word evidence could not have two meanings. In the case of *Basdeo v. John Smidt* (1) the value of verification was discussed. As regards the degree of proof, see s. 3 of the Evidence Act. Under s. 47 of the Divorce Act a petition could be regarded as evidence and petitions stood upon the same footing as plaints. It could not be imagined that under the Divorce Act a lower standard of proof was required. See O. XIX of the Code as regards the use of affidavits, and also Phipson on Evidence, 3rd Edn., p. 216.

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The appellants were not called upon to reply.

SANDERSON C.J. This is an appeal by the defendants in the case, J. B. Ross & Co., against the judgment which was given by the learned Judge in the Court below in favour of the plaintiffs under these circumstances : the action was brought for unliquidated damages arising upon an alleged breach of contract which was made between the plaintiffs and the defendants. The damages claimed were based upon the ordinary rule, viz., the difference between the contract price and the market price at the time the contract ought to have been performed. The summons was served, but the defendants did not enter appearance within the time specified in the summons, nor did they put in a written statement of defence within the time mentioned in the summons. Thereupon, the case was put upon the list of undefended cases, and it came before the learned Judge in due course. Then an application was made to the learned Judge on behalf of the defendants for leave to appear and defend. The application was based upon the ground that the gentleman representing the defendant firm had been

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away and that he had sent a telegram which was not delivered to his attorney in the way it had been sent, and that through that mistake the attorney understood that he had no instructions to defend, whereas, as a matter of fact the defendant had given instructions to his attorney to appear, and the result was that no steps were taken to defend the suit. The learned Judge having refused the defendants leave to appear, proceeded to give judgment for the plaintiffs without hearing any evidence for the full amount claimed; and the question which has been raised in this appeal, is whether the learned Judge was entitled so to do.

Now, I am of opinion, in spite of the ingenious and able argument which has been addressed to us by Mr. Buckland on behalf of the plaintiffs, that the learned Judge had no jurisdiction to make the decree which he in fact did.

The fundamental principle is that the plaintiff, when he comes to Court, must prove his case, and he must prove it to the satisfaction of the Court. There are certain rules, made under the powers of the Civil Procedure Code, expressly limited to certain cases in which *proof*, in the ordinary sense of the word, by the plaintiff of his case is dispensed with; and, those rules are contained in Order XXXVII, rule 2. of the Civil Procedure Code. That is a rule which is limited to bills of exchange, hundis or promissory notes, and it provides that "All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 in Appendix B, or in such other form as may be from time to time prescribed." Then it goes on to provide in clause (2) that "In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend

the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend; and in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons" and so on. Now, this rule created an exception to the ordinary fundamental rule to which I have referred; and, in my opinion, one of the reasons why that exception was made was because of the special nature of the documents mentioned in that rule, namely, negotiable instruments such as bills of exchange, hundis or promissory notes. It is a procedure which is somewhat analogous to the procedure under Order III, rule 6, of the rules which are applicable to England, but it is of a much more limited nature. As far as I am aware, in the rules which are applicable to this Court there is no other provision under which proof by the plaintiff, in the ordinary course as we understand it, in support of his claim, can be dispensed with.

Reliance was placed by the learned counsel, who argued this case for the plaintiffs, upon two points. He said that there was evidence in this case and that the evidence consisted in the plaint which was verified in accordance with the *rules of the Court*, and he relied first upon Order VIII, rule 5.

In my judgment, Order VIII, rule 5, does not apply to this case at all. That rule says "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability: provided that the Court may in its discretion require any fact to be proved otherwise than by

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such admission." I think it is clear from the wording of that rule that it is only intended to apply to a case where a pleading has been put in by the defendant; and I think the short answer to the learned counsel's argument on that point is that the rule is not intended to apply to a case where the defendant has not put in a written statement. It should be noted that in this case where the claim is for unliquidated damages, even if a written statement had been put in, it would not have been necessary for the defendants to deny specifically the damages: it would have been quite sufficient if they had pleaded generally to the damages and in that case even though all other material facts were admitted in the defence, there would still have been the necessity for some enquiry to be made either by the Court which heard the case, or by the Official Referee or some other person to whom the Court might refer the enquiry, to ascertain the amount of damages to which the plaintiffs would be entitled.

The other point is that if the learned counsel was not right in relying on Order VIII, rule 5, still there was some evidence in the case, because the plaint in itself constituted evidence, inasmuch as it had been verified in accordance with the rules of the Court.

Speaking for myself, I am not prepared to accede to that argument. First of all, I think the rule is that the plaintiff must give the best evidence he can; and, if the plaintiff were alive and could come to Court it would be necessary for him to prove his case by producing evidence in the ordinary and well recognised way, and I should have thought that the Court would not be justified in allowing the plaint to be put in as evidence of the facts on which he wished to rely. It is to be pointed out that the plaint is not verified by an affidavit; it is simply verified either by the signature of the party or parties or by

some person who is authorised to verify on his or their behalf.

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But it is said by Mr. Buckland that section 191 of the Indian Penal Code shows that the plaint ought to be considered as *evidence* in the case; and there it was that I think he showed considerable ingenuity in advancing the argument which he did in favour of the plaintiffs. I am bound, however, to say that I do not think that the argument is a good one, and for this reason: the point is, that the plaint is *evidence* because it is to be verified in accordance with the rules. If we look at section 191 of the Indian Penal Code, we find this "whoever . . . being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence." Therefore, he argues that inasmuch as the plaintiff, if he verified a statement in his plaint which he either knew or believed to be false, might be proceeded against under section 193, because he would have been taken to have given *false evidence*, his plaint ought to be considered as *evidence* in the case. The answer to that is this: I think that the object of the Legislature is pretty clear. First of all the object of the rule insisting upon the verification of the plaint is clear, namely, that it was thought desirable to insist upon some guarantee that a false or totally trivial claim should not be put before the Court. There would be no such guarantee by simply requiring a man to make a verification of the claim, unless there was some sanction. Mr. Buckland says that the sanction is section 191. I think it is clear that section 191 was framed in the way in which it stands for this reason. It was the obvious intention of the Legislature to bring such a case, namely, the verification of statement in the pleadings by a person who

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knew them to be untrue within section 193. Section 193 deals with the case of a man intentionally *giving false evidence* and the method the Legislature employed for bringing such case as I have referred to within section 193 was to say that if a man being bound by law to make a declaration upon any subject makes any statement which is false to his knowledge he shall be deemed to *give false evidence*. The words are "he is said to give false evidence," and those words are employed simply for the purpose of bringing the case within section 193, and for no other purpose. With great deference to the learned counsel, I think it would be unreasonable to conclude from that section that it was ever intended that a plaint which has the usual verification by the plaintiff could be adopted by a Court of justice as sufficient proof of the facts which are contained in the plaint.

Therefore, I am of opinion that the two grounds upon which the learned counsel has relied cannot be upheld.

Before I conclude my judgment, I would like to say one word from the general point of view. Of course, if we had found in the rules or in the statutes any provision giving the learned Judge a jurisdiction to deal with the case in the way he has done, we should have been bound to follow it. But I cannot help saying that it would be undesirable if a suit such as this were adjudicated upon without any evidence, in the real sense of the word, given by the plaintiff, where the claim is for unliquidated damages. The learned counsel in the course of his argument when I put the question to him, had to admit that in a very large number of cases where the claim is for unliquidated damages, the damages are inflated. It may be that in some cases they are intentionally inflated, but in most cases they are quite unintentionally

inflated. The question of the proper measure of damages is one of the most difficult questions that a Court of justice has to deal with, and in many cases of unliquidated damages the amount which is put in the statement of claim is found to be wrong when the case comes to be investigated, and the amount of damages to which the plaintiff is actually entitled is different from that which the plaintiff has inserted in his plaint. Therefore, it shows the desirability and necessity in such cases, when the defendant does not appear, that the plaintiff should be called upon to prove all the material facts which are necessary for the proof of his case, that is, not only the cause of action upon which he relies, but also the actual amount of damages which he has in fact sustained. I think that if this course is not pursued, injustice may be done.

The appeal is, therefore, allowed.

With regard to costs of the appeal, I do not see any reason for interfering with the ordinary rule that costs should follow the event. Therefore, the appeal is allowed with costs. The facts upon which the defendants rely have been verified by an affidavit, and the learned counsel for the plaintiffs frankly admitted that he had no reason to suppose that they were not as stated in the affidavit.

Therefore, I think, that this case should be remanded for hearing and that the defendants should have leave to put in a written statement of defence, and to call such evidence, as they may think desirable, in support of their case. With regard to the costs of the application for stay of execution, in my judgment, each party should pay his own costs.

WOODROFFE J. In my opinion no decree can legally be given in any case without evidence, except in cases

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of suits governed by the provisions of Order XXXVII of the Civil Procedure Code. According to rule 2, sub-rule (2) of that Order, in default of obtaining leave to appear and defend or of appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons. This, in my opinion, is strong evidence of the intention of the Legislature that it is only in such cases that the allegations in the plaint should be deemed to be admitted and amount to proof on which a decree may be founded when there is no written statement and the defendant does not appear.

The procedure in this country is not that which prevails in England. In my experience the practice sought to be upheld by the respondents has not hitherto prevailed in this Court where it has always been the practice in undefended cases to take evidence as defined in the Evidence Act, viz., oral statements of witnesses and documents proved before the Court. The *cursus curiae* may be looked at when interpreting the terms of the Civil Procedure Code. There is, in my opinion, nothing in the decision [*Galstaun v. Hutchison*(1)] to which I was a party and in which judgment was also delivered by the late Chief Justice, which justifies the contention which has been advanced by the respondent before us. In this case the plaintiff gave evidence and proved his claim, but a question of stamp arose. The defendant entered appearance but did not file a written statement. The Code, however, is clear. The case does not fall under Chapter XXXVII, for the suit was based upon an alleged breach of contract claiming unliquidated damages.

The decree has been sought to be justified by an application of rule 5, Order VIII of the Civil Procedure Code and by the argument that verification of pleadings dispenses with evidence. As all pleadings in this Court are verified, this latter contention is simply a re-statement of the argument that a decree can be given on pleadings without evidence in undefended cases. This contention is a novel one. Verification does not, in my opinion, dispense with evidence. But it is merely a form of giving authenticity to the pleadings. The object of the verification of the plaint is to fix on the plaintiff the responsibility for the statements which it contains and to afford a guarantee of his good faith. See the case of *Bisdeo v. John Smidt* (1). Verification, in my opinion, is not evidence on which a suit can be decreed, whether the adversary does or does not appear. Because a false verification may be the basis of a prosecution under section 191 of the Penal Code, as coming within the definition of "False Evidence" for the purposes of the Penal Code, that does not make a verification evidence on which a decree can be founded in a civil suit.

Moreover, under Order XIX of the Code the Court may allow facts to be proved by affidavit, but the Code expressly stipulates that the affidavit must be confined to facts within the personal knowledge of the deponent, except in cases of interlocutory applications on which he is permitted to speak to his own belief. This knowledge by no means always exists in the case of verification of pleadings and the present case is an illustration in point—the plaint having been verified by the attorney of the plaintiffs who states that the allegations in the plaint are based on information received by him and believed by him to be true.

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It is then said that under Order VIII, rule 5, this procedure can be justified. This rule, in my opinion, has obviously no application. Order VIII is headed, as appears from the title of the chapter, "Written statement and set-off," and the rule assumes existence of a pleading of the defendant; for it states "that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability." This section is really a rule of construction of the defendant's pleading. It cannot be said that a fact is admitted until one looks at the written statement. This rule does not apply where there is no written statement at all. The law says as a rule of construction, that if there is a written statement and the fact as alleged in the plaint is not denied, then the written statement must be so construed as to be taken to have admitted such allegation. The rule does not, in my opinion, justify the passing of a decree on no evidence where there is no written statement.

Under Order IX, rule 6, where the plaintiffs appear and the defendant does not appear when the suit is called on for hearing, then if it is proved that the summons was duly served, the Court may proceed *ex parte*. "Proceed *ex parte*" means "proceed to take and determine on evidence" and this is what the summons in the suit says. The summons does not say that on failure to appear the plaintiff is entitled to a judgment by default, but on the defendant's failure to appear the case will be heard and determined *ex parte*, that is, in his absence by the taking of evidence.

In my opinion, the decree having been made without evidence cannot be supported. As the plaintiff did not tender any evidence, strictly speaking the

suit should be dismissed. But Mr. Langford James, who appears on behalf of the appellants, does not insist on this or contend that we have no power to remand. So I need not discuss this question.

The decree will, therefore, be set aside and the case will be remanded in order to be reheard after giving the defendants an opportunity of filing written statement and of adducing evidence. The circumstances on which reliance is placed as entitling the defendants to defend the suit are not contested.

In my opinion, the appellant is entitled to his costs of this appeal.

MOKERJEE J. I am clearly of opinion that there has been no trial of this suit in conformity with the procedure prescribed by the Legislature, and that the decree in favour of the plaintiffs cannot possibly be supported. Mr. Buckland, who has made a strenuous endeavour to support the decision under appeal, has conceded that the procedure adopted for the trial of this suit is novel; but he has argued that novelty did not necessarily indicate departure from law. This may be conceded. But when recourse is had to a novel procedure, which has escaped the attention of generations of Judges, if the legality of the procedure is called in question, the matter undoubtedly deserves careful scrutiny.

The very brief history of this litigation which involves a sum of over Rs. 17,000 may be stated in a few words. On the 24th January, 1916, the plaintiffs lodged the plaint in this Court for recovery of Rs. 17,578-13-8 from the defendants as liquidated damages for breach of a contract alleged to have been made on the 21st December, 1914. Summons is said to have been served upon one of the partners of the defendant firm on the 10th February, 1916. The suit

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Ross & Co. came on for trial on the 13th March, 1916. Up to that stage, the defendants had not entered appearance or filed a written statement; but Mr. Gregory appeared on that day on their behalf and asked for leave to defend. Leave was peremptorily refused. The plaintiffs, however, did not adduce any evidence; and the following order was thereupon recorded: "Judgment for the amount claimed, 6 per cent. on decree. Costs on scale No. 1." We are now invited to set aside this decree as not founded on any legal evidence.

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It is an elementary principle, which forms the basis of all legal procedure, that no litigant is entitled to obtain relief from a Court of justice unless he establishes to the satisfaction of the Court that his claim is well founded. Tested in the light of this principle, how does the claim of the plaintiffs stand? They examined no witnesses; how did they then profess to have established their claim to the satisfaction of the trial Judge? The judgment itself does not throw any light on this point. But Mr. Buckland has invoked the assistance of two doctrines, viz., *first*, the principle of admission by non-traverse, and, *secondly*, the principle that allegations in a plaint duly verified form *legal evidence* whereon a judgment may properly be based.

As regards the first branch of this contention, the principle invoked is embodied in rule 5 of Order VIII of the Code of Civil Procedure, and is expressed in these terms: "Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability; provided the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission." The

plain reading of the rule, which is really a rule of construction of pleadings, is that it is limited in its application to cases where there is in fact a pleading of the defendant. Mr. Buckland contended that it was not logical to distinguish between cases where there is a pleading by the defendant and cases where there is no pleading by the defendant. We are not concerned, however, with the question whether the principle embodied in rule 5, which I may observe parenthetically, was for the first time introduced into the Code of this country in 1908 [*Anundmoyee Chowdhurayan v. Sheeb Chunder Roy* (1)], can or cannot be defended on logical grounds; we have to apply it as we find it framed by the Legislature, and, in my opinion, its very phraseology shows that it has no application to the present case. Apart from this, the plaintiffs have to overcome an additional difficulty, because rule 3 lays down that "it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, *except damages*." This rule is based on Order XIX, rule 17, of the rules of the Supreme Court of England. That rule must be read with Order XXI, rule 4, which is in these terms: "No denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases, unless expressly admitted." Although there is no provision in our Code corresponding to Order XXI, rule 4, of the rules of the Supreme Court of England, I think we can legitimately put the same construction upon Order VIII, rule 3, as has been put in England upon Order XIX, rule 17. That interpretation will be found explained by Mr. Justice

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Hawkins in the case of *Wood v. The Earl of Durham* (1). It is plain that in the present case even if the defendants had entered appearance and filed a written statement, it would not have been obligatory upon them to plead specifically as to the amount of damages; and merely because they did not appear, they cannot be in a worse position than what they would have occupied if they had appeared and filed a written statement. I may add that if the contention of the respondents were to prevail, the provisions of Order XXXVII which are applicable to special classes of negotiable instruments would be entirely superfluous. If what is contended by the respondents is well-founded and can be legitimately done in all classes of cases, why should the Legislature provide a special procedure in Order XXXVII? I, therefore, hold without hesitation that the plaintiffs are not entitled to succeed on the basis of implied admission of their claim by the defendants.

As regards the second branch of the contention, it has been argued that as the plaint was duly verified, all the allegations therein must be deemed to be evidence in favour of the plaintiffs against the defendants and should be treated as material for the basis of the judgment of the Court. In support of this contention, reliance has been placed upon the decision of the Allahabad High Court in the case of *Queen-Empress v. Mehrban Singh* (2). In my opinion, that argument rests on no solid foundation. A comparison of the terms of sections 191 and 193 of the Indian Penal Code shows that a person who makes a false affidavit is deemed to give false evidence, in order that he may be punished under section 193 of the Indian Penal Code. Indeed, the inference may be legitimately drawn from the language used in section 191 read with section 193

(1) (1888) 21 Q. B. D. 501, 508. (2) (1884) 1 L. R. 6 All. 625

that a verified statement would not be "evidence" but for the special provision of section 191 which has been enacted for a special purpose.

In this connection, reference may usefully be made to the procedure prescribed by the Legislature for the trial of a suit in which the defendant does not appear. Order IX, rule 6, lays down that "where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then, if it is proved that the summons was duly served, the Court may proceed *ex parte*." The next stage is described in Order XVIII, rule 2, which lays down that "on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove." If the contention of the respondents were well-founded, the Legislature would no doubt have stated that where the defendant has not appeared, the case may be decided on the basis of the allegations made in the verified plaint. Reference has been made in the course of argument to the decision of the Allahabad High Court in *Basdeo v. John Smith* (1) which explains the value and object of verification. That certainly does not support the contention of the respondents. A verification is required with a view to discourage, if not to prevent, the institution of false suits; the Legislature never contemplated that verified statements should be treated as evidence on behalf of the plaintiff against the defendant. This view is confirmed on an examination of the provisions of the Code as to the use of affidavits in evidence. Order XIX defines the circumstances in which affidavits may be used as evidence and specifies the limitations subject to which this is

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permissible. If the contention of the respondents were to prevail, the provisions of Order XIX would be superfluous. It is worthy of note that section 96 sub-section (2), of the Code of Civil Procedure allows an appeal from an original decree passed *ex parte*; it is difficult to conceive how such an appeal can be of any assistance to the defendant, if there is no evidence on the record.

Reference has also been made to section 47 of the Divorce Act which, I should have thought, was against the view put forward by the respondents. If a verified plaint could always be treated as evidence, it was superfluous to make a special provision in the Divorce Act.

In my judgment there is no possible escape from the conclusion that there is no legal evidence on the record on which the decree made in favour of the plaintiffs may be supported.

The question next arises, what course should now be pursued. Mr. Langford James, in my opinion, would have been perfectly justified if he had seriously pressed his contention that as the plaintiffs are not shown to have offered or, indeed, to have been even ready with any evidence in the trial Court, the appeal should be allowed and the suit should stand dismissed. I am reluctant, however, to adopt this course, on the present occasion, for I feel doubtful how far the conduct of the plaintiffs might or might not have been affected by the novel procedure which, we were informed in the course of the argument, was adopted in the trial Court. That we are entitled to remand the case for trial is, I think, obvious. Section 564 of the Civil Procedure Code of 1882 which provided that the Appellate Court shall not remand a case for a second decision except as provided in section 562, does not re-appear in the Code of 1908. Consequently,

although there is a provision in the Code for remand in certain specified circumstances, it cannot legitimately be contended that our powers are restricted thereby and that we cannot make an order of remand if the exigencies of the case demand that such an order should be made. I am also of opinion that, on remand, the defendants should have an opportunity to file a written statement; no useful purpose will be gained if this matter is left open.

I desire to add, finally, that great caution should be exercised when suits are heard *ex parte*. This observation is, in my opinion, of universal application, *Amritnath Jha v. Dhunpat Sing* (1). But it applies with special force to cases of the description now before us, where unliquidated damages are claimed on the allegation that there has been a breach of contract. I entirely agree with the Chief Justice in the weighty observations he has made as to the exaggerated claims usually put forward in cases of this character, and the necessity for careful scrutiny into all such claims before a decree is made in favour of the plaintiff.

On these grounds I concur in the view that this appeal must be allowed with costs, the decree made by Mr. Justice Fletcher reversed, and the case remanded for trial.

Appeal allowed; case remanded.

Attorneys for the appellants: *Pugh & Co.*

Attorney for the respondents: *J. N. Taylor*

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CRIMINAL REFERENCE.

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Surety—Duty of Magistrate to inquire into fitness of each surety on evidence taken by him—Delegation of inquiry to the police or others—Rejection of sureties on a police report—Grounds of rejection—Want of control—Criminal Procedure Code (Act V of 1858) s. 122.

Under section 122 of the Criminal Procedure Code, a Magistrate must personally hold a separate inquiry as to the fitness of each surety and decide the matter on evidence taken for the purpose, and he cannot delegate to a police officer or other person the function entrusted by law to him alone.

Suresh Chandra Basu v. Emperor (1), *In re Abdul Khan* (2), *Akbar Ali Mahomed v. Emperor* (3) and *Kalu Mirza v. Emperor* (4) followed.

Queen-Empress v. Pirthi Pal Singh (5), *Emperor v. Tota* (6), *Emperor v. Ghulam Mustafa* (7), *Emperor v. Balicant* (8), *Bhairani Singh v. King-Emperor* (9), *King-Emperor v. Parmeshur* (10), *Ramanand Singh v. King-Emperor* (11), *Jai Gobind v. Emperor* (12), *King-Emperor v. Kaim Khan* (13), *Imperator v. Mahro* (14), *Emperor v. Kamal* (15), *Imperator v. Allahdino* (16), *Emperor v. Haji Usman* (17), *Piru Abdulla v. Emperor* (18), *Muhammad Ibrahim v. Emperor* (19) approved.

* Criminal Reference, No. 73 of 1916, by C. Tindall, Sessions Judge of Bankura, dated May 13, 1916.

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| (1) (1904) 3 C. L. J. 575. | (10) (1904) 1 Cr. L. J. 459. |
| (2) (1906) 10 C. W. N. 1027. | (11) (1908) 8 Cr. L. J. 344. |
| (3) (1914) I. L. R. 42 Calc. 706. | (12) (1912) 13 Cr. L. J. 760. |
| (4) (1909) I. L. R. 37 Calc. 91. | (13) (1906) Panj. Rec. 18. |
| (5) (1898) All. W. N. 154. | (14) (1908) 10 Cr. L. J. 225. |
| (6) (1903) I. L. R. 25 All. 272. | (15) (1908) 10 Cr. L. J. 230. |
| (7) (1904) I. L. R. 26 All. 371. | (16) (1911) 12 Cr. L. J. 410. |
| (8) (1904) I. L. R. 27 All. 293. | (17) (1910) 11 Cr. L. J. 497. |
| (9) (1914) 12 All. L. J. 1004. | (18) (1913) 15 Cr. L. J. 378. |
| | (19) (1914) 16 Cr. L. J. 100. |

Want of sufficient control over the person bound down is not a valid ground for the rejection of a surety.

Kalu Mirza v. Emperor (1), *Jira Natha v. Emperor* (2), *Queen-Empress v. Rahim Balkish* (3) and *Sheikh Zikri v. Emperor* (4) referred to.

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THE facts of the case were as follows. A proceeding under s. 110 of the Criminal Procedure Code was instituted against one Rayan Khan and others in the Court of the Subdivisional Officer of Bankura, who by an order, dated the 1st December, 1915, bound down seven of accused, each in the sum of Rs. 200, together with two sureties respectively in the like amount, to be of good behaviour for one year, and in default sentenced them to rigorous imprisonment for the same period. Two others were similarly directed to execute bonds with sureties to be of good behaviour for three years with the alternative of rigorous imprisonment for such term.

On the 24th and 26th January, 1916, each of the accused produced two sureties who filed the title-deeds of their properties. The Magistrate, without himself holding an inquiry into the question of the fitness of the sureties, referred the matter to the police in the following terms :

"To police for inquiry if the surety is fit ; forward documents also."

The Sub-Inspector of Police thereafter submitted the following report :—

"The proposed sureties are not fit. They have not sufficient control over the accused, and they have no sufficient (property) to pay the amount in case of default, so under the circumstances I cannot recommend this."

The Magistrate, thereupon, rejected the sureties offered by the accused and required them to furnish others instead, with the result that the persons bound down were sent to jail. On the 13th May, the Sessions Judge of Bankura referred the cases of nine of these persons to the High Court, under s. 438 of the Criminal

(1) (1909) I. L. R. 37 Calc. 91, 101. (3) (1898) I. L. R. 20 All. 206.

(2) (1914) 16 Bom. L. R. 138. (4) (1911) 12 All. L. J. 785.

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Procedure Code, recommending the reversal of the Magistrate's order refusing to accept the sureties.

No one appeared in the Reference.

MOOKERJEE AND SHEEPSHANKS JJ. In a proceeding under section 110 of the Criminal Procedure Code, the petitioners were directed, on the 1st December, 1915, to execute bonds for Rs. 200 with two sureties each, to be of good behaviour for one year in some cases, and for three years in other cases, in default to undergo rigorous imprisonment for their respective periods. This order was made by Mr. H. K. Mullick, Subdivisional Magistrate, Bankura. On the 21th and 26th January, 1916, the petitioners produced two sureties each, who offered to stand as sureties, and filed documents of title relating to their properties. On the 28th January, the Magistrate recorded the following order: "To police for inquiry if the surety is fit; forward documents also." As the police did not submit the report on the day fixed, the case was adjourned. The Sub-Inspector of Police subsequently reported in the following terms: "The proposed sureties are not fit. They have not sufficient control over the accused and they have no sufficient (property) to pay the amount in case of default; so under the circumstances I cannot recommend this." The Inspector of Police forwarded this report to the Magistrate with the note "Not recommended." The Magistrate thereupon recorded the following order on the 11th February, 1916: "Rejected. Let them furnish other good surety." The result was that the petitioners were all lodged in jail. The Sessions Judge has now forwarded the records to this Court with the recommendation that the order of the Magistrate be set aside, on the ground that the sureties were rejected without judicial inquiry by the Magistrate himself.

It is well settled that the question whether a

particular person who is offered as surety is or is not fit, within the meaning of section 122 of the Criminal Procedure Code, must be decided by the Magistrate himself, and his decision must be based upon evidence taken for the purpose; sureties offered should not be refused except after judicial inquiry. This view is supported by a long line of cases in this Court which are binding upon us and our Subordinate Courts, *Suresh Chandra Basu v. Emperor* (1), *In re Abdul Khan* (2), *Akbar Ali Mahomed v. King-Emperor* (3), *Kalu Mirza v. Emperor* (4). In the case last mentioned, Coxe J. doubted whether the inquiry might not be delegated to a Subordinate Magistrate. Ryves J., however, followed what has undoubtedly been the consensus of opinion in all the superior Courts in this country, namely, that the Magistrate should himself hold the inquiry into the fitness of the proposed sureties, and cannot call upon other persons to exercise the functions which are entrusted by law to him alone. Amongst the cases in Allahabad, reference may be made to the decisions in *Queen-Empress v. Pirthi Pal Singh* (5), *Emperor v. Tota* (6), *Emperor v. Ghulam Mustafa* (7), *Emperor v. Balwant* (8), *Bhawani Singh v. King-Emperor* (9). The same view has been adopted in the Court of the Judicial Commissioner of Oudh, *King-Emperor v. Parmeshur* (10), *Ramanand Singh v. King-Emperor* (11), *Jai Govind v. Emperor* (12). A similar view has been adopted by the Chief Court of the Punjab, *King-Emperor v. Kaim Khan* (13); and also by the Court of the Judicial Commissioner of Sind, *Imperator v. Mahro* (14).

(1) (1904) 3 C. L. J. 575.

(8) (1904) I. L. R. 27 All. 293

(2) (1906) 10 C. W. N. 1027

(9) (1914) 12 All. L. J. 1004.

(3) (1914) I. L. R. 42 Calc. 706

(10) (1904) 1 Cr. L. J. 459

(4) (1909) I. L. R. 37 Calc. 91

(11) (1908) 8 Cr. L. J. 344.

(5) (1898) All. W. N. 154

(12) (1912) 13 Cr. L. J. 760

(6) (1903) I. L. R. 25 All. 272

(13) (1906) Punj Rec. 18.

(7) (1904) I. L. R. 26 All. 371.

(14) (1908) 10 Cr. L. J. 225.

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Emperor v. Kamal (1), *Imperator v. Allahdino* (2),
Emperor v. Haji Usman (3), *Piru Abdulla v.*
Emperor (4), *Muhammad Ibrahim v. Emperor* (5). We accordingly accept the recommendation of the Sessions Judge, set aside the order of the Magistrate, dated the 11th February, 1916, and remand the case to him in order that he may inquire into the fitness of the sureties offered, upon such evidence as may be adduced before him on behalf of the accused. It may be added that, as there are several accused persons each of whom has offered two sureties, the fitness of each person must be separately determined. A general order without investigation of the circumstances of each of the sureties is obviously not contemplated by the law.

As the question of fitness of each surety will be determined by the Magistrate after inquiry, it is not necessary for us to specify the elements to be taken into consideration by him; but with reference to the observation in the Police report that sureties should be rejected if they do not show that they have sufficient control over the accused, we may draw the attention of the Magistrate to the fact that according to the decisions of this Court, this is not a valid ground for rejection of a surety. *Kalu Mirza v. Emperor* (6). The same view has been adopted by the Bombay High Court in a recent case [*Jiva Natha v. Emperor* (7)], though a somewhat different view is possibly indicated in *Queen-Empress v. Rahim Baksh* (8) and *Sheikh Zikri v. King-Emperor* (9).

Let the records be returned.

E. H. M.

Case remanded.

(1) (1908) 10 Cr. L. J. 230.

(5) (1914) 16 Cr. L. J. 100.

(2) (1911) 12 Cr. L. J. 410.

(6) (1909) I. L. R. 37 Calc. 91, 101.

(3) (1910) 11 Cr. L. J. 497.

(7) (1914) 16 Bom. L. R. 139.

(4) (1913) 15 Cr. L. J. 378.

(8) (1898) I. L. R. 20 All. 206.

(9) (1911) 12 All. L. J. 785.

CRIMINAL REVISION.

Sanderson C. J., and Walmsley J.

*In the matter of KHETRA MOHAN GIRI.**

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June 21.

Criminal revision—Practice—Time-limit of applications to High Court in criminal revision—Application made after the expiry of 60 days from the date of the order.

As a matter of practice the High Court will not, save in exceptional circumstances, entertain an application in criminal revision unless it is made within 60 days, excluding the time necessary to obtain copies, from the date of the order complained of.

THIS was an application by way of motion, under s. 15 of the Charter Act (24 & 25 Vict. c. 104) against an order passed under s. 145 of the Criminal Procedure Code, by the Subdivisional Magistrate of Contai, on the 8th April, 1916. It was presented to the Criminal Bench of the High Court on the 19th June, and heard on the 20th and 21st.

Babu Saroda Charan Mytee appeared for the petitioner and moved their Lordships.

[WALMSLEY J. Are you in time?]

Taking into account the time required to procure the copies, I am in time.

[SANDERSON C. J. Under what law do you deduct the time taken for the copies?]

There is no provision in the Criminal Procedure Code or the Limitation Act (IX of 1908) for such applications, but 60 days' limit has been fixed by analogy to Criminal Appeals, and section 4 of the Limitation Act would apply by reason of the same analogy.

[SANDERSON C. J. Even then the last day expired

* Criminal motion against the order of the Subdivisional Officer of Contai, dated April 8, 1916.

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last Saturday. Why did you not move on the previous Monday ?]

On Saturday your Lordships did not sit. It has been presented on the first day your Lordships are sitting since. There is no hard and fast rule of practice that the application must be made within 60 days. If the Bench takes motions once a week, and the last day falls on a holiday, I would in that case have to make the application on the previous motion day, and this would practically curtail the period of 60 days by a week. If I have a just grievance the application should not be barred simply because it is made a few days late.

SANDERSON C. J. Since yesterday I have caused enquiries to be made with regard to the practice affecting this matter, and I find that the well-known practice is that an application for revision must be made within 60 days from the date of the order complained of. The Court has allowed an addition, to the 60 days, of the time which is necessary for obtaining copies. This is not a question of limitation but a rule of the practice of the Court to the effect that an application for revision must be made within a reasonable time. It is not an inflexible rule, and in exceptional circumstances the rule might be departed from. In this case the date of making over the copy to the applicant was the 1st day of June, so that there was ample time to make this motion on one of the usual motion days, namely, Monday, the 5th of June or Monday, the 12th of June. Yet this motion was not made until the 19th of June when it was out of time. In these circumstances, we are of opinion that this application should not be entertained.

WALMSLEY J. concurred.

E. H. M.

Application refused.

PRIVY COUNCIL.

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*P.C.^o
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[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]

Hindu law—Joint family—Mitakshara law—Allegation of separation by one member of joint family—Expression of intention to hold share separately followed by suit for partition—Unequivocal and clearly expressed intention—"Separation" as distinct from "division of shares of property."

In this case their Lordships of the Judicial Committee held, on the facts, that the conduct of the plaintiff, a member of a joint Hindu family governed by the Mitakshara law, in indicating by a notice in a registered letter his intention to separate himself and enjoy his share in severality, coupled with a suit for partition was as "unequivocal" and "clearly expressed" an intention as could be made, and that it amounted to a separation with all its legal consequences.

The rule of law applicable to cases of separation from the joint undivided family laid down in *Suraj Narain v. Iqbal Narain* (1) followed.

Nowhere in the Mitakshara is it stated that agreement between all the coparceners is essential to the disruption of the joint status, or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. On the other hand numerous authorities on the subject leave no room for doubt that "separation," which means the severance of the status of jointness, is a matter of individual volition.

Separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One

* Present: LORD SHAW, LORD SUMNER, SIR JOHN EDGE AND MR. ANEER ALI.

(1) (1912) I. L. R. 35 ALL 80, 87, L. R. 40 I. A. 40, 45.

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is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy the hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share, which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable: neither the co-sharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient: the Court has simply to give effect to his right to have his share allocated separately from the others.

Madho Parshad v. Mehrban Singh(1), *Deo Bunsee Koer v. Dicarkanath*(2), *Appörer v. Rama Subha Aiyar*(3), *Joy Narain Giri v. Girish Chunder Mitra*(4) and *Vato Koer v. Roreshun Singh*(5) referred to.

APPEAL 76 of 1914 from two judgments and decrees (25th July 1912) of the Court of the Judicial Commissioner, Central Provinces, respectively, reversing an order (23rd January 1911) and a preliminary decree (8th April 1911) of the District Judge of Nagpur in Civil Suit 20 of 1908.

The representative of the plaintiff was the appellant to His Majesty in Council.

The suit giving rise to this appeal was brought by one Harihar (husband of the appellant) for partition, and for possession of a one-third share in the joint family properties (valued at 54 lakhs of rupees) of the joint Hindu family of which he and the respondent were members.

The only question for determination on this appeal was whether the appellant was entitled, as the heiress and legal representative of her deceased husband, to his share of the properties in suit, and to a decree for

(1) (1890) I. L. R. 18 Calc. 157; (3) (1866) 11 Moo. I. A. 75.

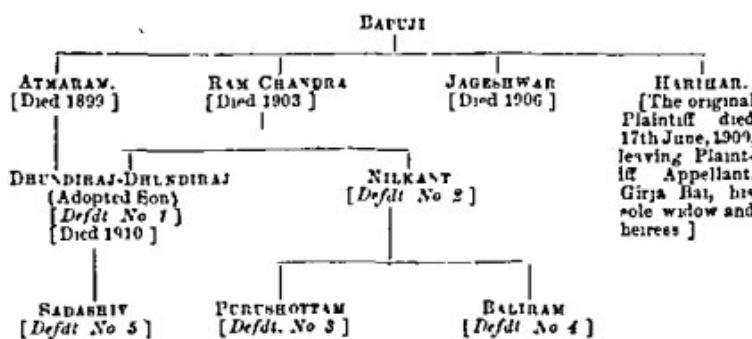
L. R. 17 I. A. 194. (4) (1878) I. L. R. 4 Calc. 434;

(2) (1868) 10 W. R. 273. L. R. 5 I. A. 223.

(5) (1867) 8 W. R. 82.

partition. The decision of this question depended on whether before his death, on 17th June 1909, Harihar had ceased to be a member of the joint family with the respondents. If he died joint in estate, as the respondents contended, the suit abated on his death, and his interest in the joint family property passed to the respondents by survivorship according to the Mitakshara law of the Benares School by which the parties were governed; but if before his death he had become separate in estate, as was contended by the appellant, she inherited his share and would be entitled to continue the suit.

The following pedigree shows the relationship of the parties to the suit :—



The joint property consisted (*inter alia*) of lands, houses and shops, and business carried on at various places.

During the life-time of Atmaram, the whole estate was under his management and control, and at each place where business was carried on it was managed by one of the members of the joint family.

Atmaram adopted the defendant Dhundiraj, and died on 5th December 1899. After his death disputes arose between Harihar on the one hand, and Ram Chandra and Dhundiraj on the other, and their relations towards one another became very strained. Dhundiraj

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1916 became the chief manager in place of Atmaram and went to reside at Nagpur.

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On 14th February 1902 Harihar and Jogeshwar gave notice to Dhundiraj that on account of the strained relations existing between them they were desirous of having the estate partitioned and of holding their shares separately, and demanded to know whether Dhundiraj and Ram Chandra would do this without recourse being had to a suit. In 1902 Harihar separated from the joint family and ceased to live as a member of it. He went to reside in a house of his own, and from that time continued separate from the other members of the family in food, residence, and worship.

Ram Chandra died in 1903 and the matters raised by the notice of 14th February 1902 remained in abeyance. Jageshwar died in 1906.

On 1st October 1908 Harihar gave notice by registered letter to Dhundiraj that he wished to have a partition of the whole of the joint family properties, and to obtain his one-third share in severalty, and asked whether he was prepared to do this privately and without delay. On 18th October Dhundiraj replied through his pleader asking Harihar not to have the properties partitioned, but suggesting that if he was determined to have the properties partitioned, there should be a friendly partition, Harihar himself making a division of all the properties into three parts, and taking one of them.

On 21st October 1908 Harihar brought the present suit against his co-sharers Dhundiraj, Nilmant and their respective sons, for partition of the joint family estate, and for separate allotment to him of his one-third share, alleging that the defendants had colluded to avoid partitioning the estate and giving him his share.

The defendants admitted the claim, and said they were willing to divide the estate. What took place before the District Judge is set out in the judgment of their Lordships of the Judicial Committee ; as also are the facts detailed which are said to amount to a separation by Harihar from the other members of the joint family.

On 17th June 1909 Harihar died, leaving his widow, the appellant, as his sole heiress ; and on 6th July she applied for substitution of her name as plaintiff in the suit in place of her deceased husband. The defendants opposed the application on the grounds that Harihar's rights in the joint family properties had passed to them by survivorship ; that his widow had no right therein, and, consequently, was not entitled to maintain the suit which should be dismissed as having abated.

The appellant thereupon filed a written statement that Harihar had unequivocally told the defendants of his intention to separate from them in estate, and had separated from them in mess and residence ; that a registered notice demanding partition had been sent, and the suit was then filed ; that Harihar's one-third share was admitted, and that a preliminary decree would have been passed on the admission of the parties had not delay been caused in various ways by the defendants. It was contended that there had been a separation in estate in fact and in law and that the appellant was entitled to succeed to the right of her deceased husband.

The defendants in a further written statement denied that there had been any unequivocal communication by Harihar of his intention to separate from them in mess and residence, and contended that, inasmuch as no judgment or decree for partition had been passed, and no partition had been in fact carried

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1916 out during Harihar's life, the family and the estate were still joint.
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 DHUNDIRAJ, The District Judge found on the facts that what had taken place between Harihar and the other members of the family amounted to a separation in residence, messing and estate between him and them; and that under the circumstances of the case, and on the authority of various reported decisions which were referred to, Harihar had prior to his death ceased to be a member of the joint and undivided family; and his widow was entitled to succeed as heiress to his one-third share and had the right to maintain the suit.

Appeals from that decision and from the preliminary decree preferred by the respondents were heard by Mr. H. V. Drake-Brockman (Judicial Commissioner) and Mr. H. J. Stanyon (Additional Judicial Commissioner) who reversed the order and decree of the District Judge, and dismissed the suit.

The Court of the Judicial Commissioner held affirming the findings of the District Judge that Harihar had lived and messed separately, and that before filing his suit he did in clear and unequivocal terms communicate to the defendants his earnest desire and fixed determination to convert his estate from a joint one into an estate in severalty; but that there had been in fact no agreement amongst all the members of the family for a severance of their joint estate. The Court further held, contrary to various reported decisions referred to, that by the Mitakshara law a separation of title and interest amongst members of a joint Hindu family could only be effected by a decree of Court, or by an agreement come to by all the members to separate, and that a declaration by one member of his intention and determination to be separate did not disrupt the family estate or destroy the right of survivorship.

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On this appeal,

Sir R. Finlay, K. C., and A. M. Dunne, for the appellant, contended that on the concurrent findings of fact by both Courts below Harihar was, at the date of his death, not a joint and undivided, but a separated member of the family, and that the one-third share in the joint properties to which he was admittedly entitled was not affected by any right of survivorship in the remaining members of the family. His share consequently passed on his death to the appellant as his sole widow and heiress. The case of *Suraj Narain v. Iqbal Narain* (1) was referred to and relied on as laying down the law in the present case, and it was submitted that the "unequivocal and clearly expressed intention" which was held to be wanting in that case was, in the present case, clearly established.

De Gruyther K. C., and J. M. Parikh, for the respondents, contended that the appellant had failed to discharge the onus which lay on her to prove that Harihar was separate in estate at the date of his death. The coparceners being collaterals, a partition of the joint and undivided property could only have been effected by an agreement between Harihar and the respondents declaring their intention to separate in estate, or by a decree for partition, and there was no such decree nor any such agreement. Harihar alone, ignoring the wishes of the respondents, could not, by a declaration of his intention to separate in estate followed by a demand for a partition by suit, convert his joint interest in the family property into a tenancy in common so as to destroy the respondents' right of survivorship therein. On Harihar's death, it was submitted, his share under the circumstances of this case would pass to the respondents by survivorship.

(1) (1912) 1. L. R. 35 AL. 80 87; L. R. 40 I. A. 40, 45.

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GIRJA BAI Any single member of a joint family can ask for separation: see Mayne's Hindu Law, 7th Ed., 331, paragraph 270. But separation was distinct from partition; the one is an alteration of title, the other an alteration of property. The notice of 1st Oct 1908 was, it was submitted, only an expression of desire that separation should be made, only a proposal for separation as it were. When Harihar brought suit, was the property joint or separate? At that time it was contended, he considered the property to be joint. At any rate it was not sufficiently separated to prevent his share from devolving by survivorship rather than descending to her who would inherit the property if he were separated. Reference was made to *Pirthi Pal v. Jowahir Singh* (1) and *Appanai Rama Subba Aiyar* (2).

[LORD SHAW intimated that the Board was prepared to recede from anything laid down in case of *Suraj Narain v. Iqbal Narain* (3). It was then contended on the facts that there was not such a declaration of intention to separate, "unequivocal and clearly expressed" as is referred to in that case. The findings of the Courts below were, it was submitted, not concurrent.

Sir R. Finlay, K. C., replied.

The judgment of their Lordships was delivered on May 19.

MR. AMEER ALI. This appeal from two judgments and decrees of the Judicial Commissioner's Court in the Central Provinces of India arises out of a suit brought by one Harihar, since deceased, on the 21st October, 1908, in the Court of the District Judge of Nagpur. The object of the suit was to obtain

(1) (1887) I. L. R. 14 Calc. 493, 505; (2) (1866) 11 Moo. I. A. 75, 83; L. R. 14 I. A. 37, 42. (3) (1912) I. L. R. 35 All. 89; L. R. 40 I. A. 40.

declaration of his right to a one-third share in certain movable and immovable properties, which till then had been held as appertaining to a joint undivided Hindu family, of which he had been a member, a decree for partition, and other ancillary reliefs.

Harihar died on the 17th June, 1909, during the pendency of his suit, and the question in the case is whether at the time of his death he was separated from the joint family. If he was, his share would be inherited by his widow Girja Bai, the appellant; if not, the defendants, respondents in this appeal, would take it by survivorship.

The facts of the case are simple, and may be stated briefly. Bapuji, the common ancestor, left several sons, among them Harihar, the plaintiff in this suit; two, Damoodur and Balaji, died many years ago without any issue. Atmaram, the eldest, who became the manager of the family on Bapuji's death, died in 1899, leaving Dhundiraj, the first defendant, the son of his brother Ram Chunder, whom he had taken in adoption. Dhundiraj became the manager after Atmaram's death, and acted as such when this suit was instituted. He has since died, and he is now represented by his son Sadashiv. Ram Chunder died in 1902, leaving Nilkantha, his son, and two grandsons, all of whom are defendants in this action. Jageswar, another brother, died in 1906 without leaving any male issue. Thus, on the 21st October, 1908, when he brought his suit, Harihar was entitled to a one-third share of the joint property. It is alleged in the plaint that after Atmaram's death "dissensions arose in the joint and undivided family," and in consequence thereof two shops were set up at Parsoni, their place of residence, one in the name of Harihar, the other in that of Dhundiraj, and separate *bhaki-khattas* (account-books) were opened in their

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respective names. The plaintiff further alleged that for "these reasons" he did not wish to continue as a member of the joint family; that he had communicated his intention to the defendants; and had, on the 1st October, 1908, served a registered notice on the first defendant, "the manager of the joint family," and "as the defendants were collusively putting off partition and evading to give him his share he was obliged to bring this suit." The cause of action was stated to have arisen on the 1st October, 1908, when he demanded partition and his one-third share.

The defendants admitted the plaintiff's claim, and added that in answer to the registered notice, the first defendant had stated that he had no objection to a division of the estate which "should be made by private persons without going to Courts." They further urged that as they were willing to divide the estate, the suit was premature and that they should not be saddled with costs.

What took place before the District Judge subsequent to the appearance of the defendants and the filing of their written statement appears clearly from the judgment of the Judicial Commissioners under appeal. The learned Judges say:—

"The defendants entered appearance on the 15th February, 1909, and on the 9th March, 1909, it was admitted on their behalf that the plaintiff was entitled to have a decree for partition of a one-third share. As to the property to be divided, after some controversy the parties were in agreement except in respect of certain movables. The District Judge, being desirous of consulting the parties regarding the best mode of carrying out the partition, adjourned the case for their personal attendance to the 4th May, 1909. On that date the case was put off to the 10th May, 1909, at the instance of the defendants, who sought a compromise. Then there was a further adjournment to the 20th June, 1909, upon the ground that the illness of defendant Dhundiraj had prevented negotiations for a compromise."

On Harihar's death on the 17th June, 1909, his

widow, Girja Bai, the present appellant, applied for substitution as the heir and legal representative of her deceased husband, and then the contest began. The defendants objected to her substitution, on the ground that at the time of his death Harihar was an undivided member of a Hindu joint family, and that on his decease his share passed to them by survivorship. On the 23rd January, 1911, the District Judge overruled their objections, and made the usual order for substitution in favour of the appellant. The case then proceeded to trial, and on the 8th April, 1911, a preliminary decree was made directing partition of the joint estate by commissioners appointed for the purpose.

The defendants appealed to the Judicial Commissioner's Court both from the order of the 23rd January, 1911, directing the substitution of Girja Bai's name in place of her deceased husband, and from the preliminary decree of the 8th April following. The Judicial Commissioners in an elaborate and learned judgment have upheld the defendants' contentions; in substance the conclusion at which they have arrived amounts to this: that no member of a joint undivided family under the law of the Mitakshara can separate himself from the joint family, or sever the status so far as he himself is concerned, without the consent of the others, or without an effective decree of the Court.

The two following passages from the judgment of the Appellate Court will show that their Lordships apprehend correctly the decision of the learned Judicial Commissioners. In one place, dealing with Harihar's action, they say:—

"The defendants admitted what they could not deny, namely, that Harihar had a joint one-third share with themselves which he was entitled to have partitioned; but to confess the existence of a co-parcenary

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interest is not the same thing as even a passive consent to the severance of that interest ; much less is it tantamount to an agreement to divide. The defendants never denied the title of Haribar, either before or after the suit, but they were all along averse to a partition, and, up to the day of his death, sought to compromise the suit by inducing him to abandon his desire to break up the joint estate. When he died the case stood adjourned in order that a compromise might be effected, and, in the circumstances, the only compromise (once the share of Haribar and the estate to be divided had been admitted), which defendants could have sought, was an abandonment of the partition. The pleadings merely indicate what had already taken place, namely, that Haribar had finally decided to sever his estate, and had demanded that this should be done."

And again :-

"It remains therefore to decide, whether, as claimed by the plaintiff, Haribar alone, despite the wishes of the other co-parceners, could, by setting up an intention to separate followed by a demand for partition, convert his joint share into a tenancy in common, so as to destroy the defendants' right of survivorship therein ; his title as co-parcener, and the extent of his share being admitted by the defendants. If this is the law, then the plaintiff must succeed. If, on the other hand, agreement between the all coparceners in pursuance of an intention to divide was necessary to cause the severance of interest claimed by the plaintiff, then the appeals of the defendants now before us must prevail."

Their Lordships regret they cannot assent either to the inferences of law sought to be derived from the undisputed facts in the case, or to the principle on which the learned Judges purport to base their judgment.

Their Lordships think it necessary to refer again briefly to some of the circumstances with regard to which the Appellate Court appears to be under a misapprehension. As already stated, Atmaram, the eldest brother, who, on Bapuji's death, became manager, died in 1899. Disputes in the family, as Harihar alleged in his plaint, arose shortly after his death. On the 14th February, 1902, Haribar and Jageswar, who was alive at the time, wrote to Dhundiraj, who had become manager in his adoptive father's place, intimating their wish to separate themselves from the

oint family, and asking him to have a division of the family property made by arbitrators. Matters seem to have remained in a quiescent stage for the next six years, although Harihar alleged that two shops and business accounts had been opened in his and the first defendant's separate names.

Jageswar died in 1906, and on the 1st October, 1908, Harihar sent to Dhundiraj the registered letter already referred to. In that letter he says in explicit terms that his desire is to get partitioned his one-third share, and asks Dhundiraj to take the matter in hand "soon after the receipt of the letter" and to make a division of the joint estate, and adds, "but do not delay partition." On the 19th October the defendant sends a reply through a pleader; he first tries to persuade Harihar to abandon his intention of getting the joint estate divided, and then goes on to say: "If you, nevertheless, intend to have a partition made, it is better you should yourself make it, since you are senior." And the mode in which this should be done is suggested.

Harihar, evidently not satisfied with the delay that had taken place in the reply, brought his suit three days after the defendant's letter. Written statements were filed on the 15th February, 1909, and on the 9th March following, the District Judge recorded the following additional statement, as he calls it, by the defendant's pleader: "The defendants do not deny the plaintiff's right to claim one-third share in the joint family property, both movable and immovable. The plaintiff's suit is not premature, but he will not be entitled to his costs because we were ever willing to give him his share."

The District Judge's order made on that date is significant. After stating that neither the plaintiff's right to claim partition nor the extent of his share is

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denied, he says : " Under these circumstances, I think it necessary to have the parties before me in person, so that I may ascertain from them how the partition is to be effected."

It appears to be absolutely clear that on the 9th March, 1909, the parties were of one mind on the question of partition. The plaintiff demanded a division of the joint family property. The defendants had agreed, perhaps at first unwillingly, to the demand, which they could not resist. The only question that remained for the Court to determine was the best mode of effecting the division. Their Lordships are unable to see on that date any disagreement or averseness in fact to the plaintiff's demand on the part of the defendants. All his acts subsequent to the registered notice evince a fixed determination to sever himself from the joint family. With reference to these acts, the Judicial Commissioners say as follows :—

" Rao Bahadur Bapurao Dada, a well-known pleader of this Court, examined as the fourteenth witness for Harihar's widow, has proved that Harihar refused all proposals to continue in a state of jointness after he had sent the letter of 1st October, 1908 ; that he persisted in his demand for a share ; and that his demand not being promptly complied with, he filed the present suit. He himself bought the stamp, and first asked Mr. Bapurao Dada, the family lawyer, to institute the litigation ; but finding him disinclined to do so, because he was engaged in mediating to bring about a compromise, Harihar had the plaint presented by another legal adviser leaving Mr. Bapurao Dada to appear for the defendants."

And they go on to say—

" Upon these facts we have no hesitation in coming to the conclusions—

" 1. That before filing the suit Harihar did in clear and unequivocal terms communicate to the defendants his earnest desire and his fixed intention to convert his estate from a joint estate into an estate in severalty."

The learned Judges, however, as already observed, held that this was not sufficient to constitute a severance of the joint status.

In the case of *Suraj Narain v. Iqbal Narain* (1).

(1) (1912) 1. L. R. 25 ALL. 80 ; L. R. 40 I. A. 40.

the rule of law applicable to cases of separation from the joint undivided family was laid down by their Lordships in the following terms :—

" What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family, and convert a joint tenancy into a tenancy in common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty, may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed."

It would probably be enough for the determination of this appeal to say that nothing could be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severalty by the notice of the 1st October, 1908, coupled with this suit, and that these acts amounted to a separation with all its legal consequences.

But as the question of the effect on the joint status of such an intention has been raised in this case in a direct and concrete form, their Lordships think it fit to discuss the principle somewhat more fully than was necessary in *Suraj N rain v. Iqbal Narain* (1).

In the Hindu law, "partition" does not mean simply division of property into specific shares; it covers, as pointed out by Lord Westbury in *Appovier's Case* (2), both "division of title and division of property." In the *Mitakshara*, Vijnaneswara defines the word *vibhaga* which is usually rendered into English by the word "partition," as the "adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate." Mitra Misra explains in the *Tiro-mitrodaya* the meaning of this passage: he shows

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(1) (1912) I. L. R. 35 All 80.
L. R. 40 I. A. 40.

(2) (1866) 11 Moo. I. A. 75

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that the definition of Vijnaneswara does not mean exclusively the division of property into specific shares as alone giving right to property, but includes the ascertainment of the respective rights of the individuals, who claim the heritage jointly. He says (*Sarkar's translation, chap. I, sec. 36*): "For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary right into specific shares." The *Viro-mitradaya* is a commentary on the Mitakshara, the value and importance of which have been repeatedly recognised by the Board. So far as their Lordships are aware, nowhere in the Mitakshara is it stated that agreement between all the coparceners is essential to the disruption of the joint status or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. If this were so and there were minors in a joint undivided family, partition would be impossible until they had all attained majority, a position which is expressly combated and negatived in the *Viro-mitradaya* (*chap. II, sec. xxiii*). In fact later writers leave no room for doubt that "separation" which means the severance of the status of jointness is a matter of individual volition. For example, Nilkantha the author of the *Vyavahara Mayukha* (*chap. IV, sec. iii, Mandlik's translation, p. 38*), expressly lays down that "even when there is a total absence of common property a partition is effected by the mere declaration 'I am separate from thee,' for partition is a particular condition of the mind, and the declaration is indicative of the same." The *Sarasvati-Vilasa* gives expression to the same view. After quoting the definition of various earlier writers, it says:

'from this it is known that without any formality partition can be effected by mere intention?' (Sutler's translation of Hindu Law Books on Inheritance, p. 122). Their Lordships are aware that the *Vayavahara Mayukha* is not recognised as an authority in the Benares school; they refer, however, to the dictum of Nilkantha as showing the general conception of Hindu legislators on the subject of severance from jointness. But the following gloss in the *Viromitrodaya* appears to their Lordships conclusive on the rule of law under the Mitakshara: "Here again," it says, "partition at the desire of the sons," which expression includes grandsons and great-grandsons (see sec. 23A), "whether in the lifetime of the father or after his demise, may take place by the choice of a single coparcener, since there is no distinction," (Chap. II, sec. xxiii).

Their Lordships do not think it necessary to examine further the law as laid down in the texts. They propose to refer shortly to the cases which establish clearly that separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and

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DRUNDIRAJ. clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well-founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others.

In *Madho Parshad v. Mehrban Singh*(1), Lord Watson delivering the judgment of this Board, declared in explicit terms, the nature of the right possessed by individual members of a joint and undivided Hindu family: "Any one of several members of a joint family," he said, "is entitled to require partition of ancestral property, and his demand to that effect, if not complied with, can be enforced by legal process." Partition does not give him a title or create a title in him, it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers. Lord Watson makes this perfectly clear in the passage that follows:—

"So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes; but as soon as partition is made he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property."

In this connection their Lordships desire to refer to the language used by that distinguished Hindu Judge, Mr. Justice Dwarkanath Mitter, in *Deo Bansee Koer v. Dwarkanath* (2) a Mitakshara case.

"Now it is a settled doctrine of the Hindu law," said that learned Judge, "that every member of a joint undivided family has an indefeasible

(1) (1893) I. L. R. 18 Calc. 157;

L. R. 17 I. A. 194.

(2) (1869) 10 W. R. 273.

right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not."

It appears to their Lordships that the Appellate Court has, in this case, confused the two considerations to which reference has been made above, viz., the severance of status which is a matter of individual volition, with the allotment of shares which may be effected by different methods: by private agreement, by arbitrators appointed by the parties, or, in the last resort, by the Court.

In *Anopovier v. Rama Subha Aiyen* (1), this Board had to deal with an argument based on a similar notion that a deed of division between the members of an undivided family "which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, was ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds." Lord Westbury, delivering the judgment of the Board, pointed out that the argument advanced before their Lordships proceeded "upon error in confounding the division of title with the division of the subject to which the title is applied." Then, after stating "the true notion of an undivided family under Hindu law," he proceeds thus:

"But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in sevarality, although the property itself has not been actually severed and divided."

And in another place, he adds, "it is necessary to bear in mind the twofold application of the word

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'division.' There may be a division of right, and there may be a division of property."

Some of the Courts in India have supposed Lord Westbury's expressions to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view. The Board there was dealing with a case in which division of right had already taken place, as evidenced by the "deed of division." The right which each individual member had in this joint property did not spring from the deed or the agreement of the parties to which it gave expression; the agreement only recognised existing rights in each individual member which he was entitled to assert at any time he liked.

The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct it will be for the Court to determine whether it was unequivocal and explicit. In *Joy Narain Giri v. Girish Chunder Myti*(1), their Lordships regarded the conduct of one of the two co-sharers who constituted the joint family "when he left the joint residence and withdrew himself from commensality as indicating a fixed determination henceforward to live separately from his cousin," and treated "the fact of his borrowing money for his maintenance, as well as making a will as indicating, at all events, that he himself considered that a separation had taken place." The conclusion was based on the inference of intention derivable from the acts and declarations of the member who, it was alleged, had separated himself, and not from the conduct or attitude of any other party.

As early as 1867, shortly after the judgment of the

Judicial Committee in *Appovier's Case* (1), Mr. Justice Kemp, one of the most eminent Judges of the Calcutta High Court, sitting with Mr. Justice Glover, in *Vato Koer v. Rowshun Singh* (2) a case governed by the law of the Mitakshara, expressed himself thus on this question of separation :—

" Taking then the admitted facts of the case before us, we find that Sohun did publicly and unequivocally by petition presented in Court declare his intention to become from the date divided in estate. Such an intention amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. The acts and declarations of Sohun Singh, showing an unmistakable intention to hold and enjoy his own estate separately and to renounce all rights upon the share of his coparceners, constitute, in our judgment, a complete severance or partition."

With that view of the law their Lordships entirely concur.

In the present case, Harihar, the husband of the appellant, unequivocally and unmistakably manifested his intention to separate himself from the defendants, and to hold, possess, and enjoy his unquestioned interest separately from them. In their Lordships' judgment, this was sufficient, under the Hindu Law, to constitute a separation and to divide him in estate from his coparceners.

Their Lordships are accordingly of opinion that the decrees of the Judicial Commissioners should be reversed, and those of the District Judge should be restored.

The respondents must pay the costs of this appeal and of the appeals in the Judicial Commissioners' Court. And their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitor for the appellant : *Edward Dalgado.*

Solicitors for the respondents : *Downer & Johnson.*

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APPELLATE CIVIL.*Before Holmewood and Imam JJ.*

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Mortgage—Gross and culpable negligence of vendor (first mortgagee) in leaving title deeds with vendee (mortgagor)—Whether prior mortgage postponed thereby in favour of subsequent mortgage by deposit of title deeds—Search in Registration office—Constructive notice—Priority—Transfer of Property Act (IV of 1882) ss. 3, 78.

Section 78 of the Transfer of Property Act makes its three ingredients “fraud, misrepresentation, or gross negligence” disjunctive and one cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive.

Monindra Chandra Nandy v. Troyluckho Nath Burat (1) discussed and distinguished.

Walker v. Linom (2) followed.

Neglect to recover the title deeds by a vendor from a vendee who has secured the greater part of the purchase money to the vendor by giving him a mortgage on the property itself, when the vendor has full notice that the vendee is impecunious and a bad paymaster, and thereby the vendee is enabled to obtain a second mortgage on the property by deposit of the title deeds, is gross and culpable negligence (which postpones the prior mortgagee), and is rendered more so by a deliberate suppression of the existence of the mortgagee in the sale deed and a suggestion that the purchase money was required in cash and paid accordingly.

Colyer v. Finch (3) followed.

Registration not being itself notice, a search made by the clerk to the solicitor to the vendee (mortgagor), who has an interest to conceal the

* Appeal from original Decree, No. 29 of 1914, against the decree of A. C. Ghose, Subordinate Judge of 24-Perganahs, dated Sep. 17, 1913.

(1) (1898) 2 C. W. N. 750. (2) [1907] 2 Ch. 104.
(3) (1856) 5 H. L. 905, 924.

encumbrance from the second mortgagee, cannot saddle the latter with notice of the encumbrance.

Matras Building Company v. ouelandton (1), and Manji Karimbhai v. Hoorbai (2) followed.

APPEAL by Nanda Lal Roy and others, the plaintiffs.

In 1909 the defendant No. 2, one Abdul Aziz, an old man of 70, purchased a masonry dwelling house, being No. 81 Kurrya Road, Ballygunj, in the suburbs of Calcutta for Rs. 22,000. The property not letting at its proper value, the defendant No. 2 and his son determined to sell it and invest the cash proceeds in other property, and the defendant No. 1, one Rajani Kanta Pattadar, made an offer of Rs. 32,000 which was evidently accepted by the defendant No. 2 on the footing that the whole was going to be paid in cash. The conveyance was executed on 25th July 1911 and registered on 26th July 1911 being for full consideration, yet the property is said to have remained in the possession of defendant No. 2 under a mortgage which purported to be a simple mortgage without interest securing the balance of the purchase money, viz., Rs. 29,500, Rs. 500 having been actually paid in cash and Rs. 2,000 by means of a hand note. The title deeds were also left with defendant No. 1, who on 20th September 1911 was thus able by deposit of title deeds to borrow Rs. 13,000 from the plaintiff who was not aware of the alleged circumstances under which defendant purchased and mortgaged the property in suit, no mortgage having been discovered after a search in the registration office by plaintiff's solicitor. On 29th January 1913 the plaintiff brought the present mortgage suit in the 1st Court of the Subordinate Judge, Alipur, to recover Rs. 15,000 odd on his mort-

(1) (1890) I. L. R. 13 Mad. 393; (2) (1910) I. L. R. 33 Bom 342, 348.
(1891) I. L. R. 15 Mad. 268

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gage from defendant No. 1 by postponing the alleged prior mortgage executed by defendant No. 1 in favour of defendant No. 2 on the ground that the defendant No. 2, the original owner of the property, had by surrendering the title deeds into the hands of defendant No. 1 and suppressing the mortgage to himself and making it appear that the sale to defendant No. 1 was for a cash consideration of Rs. 32,000 afforded defendant No. 1 opportunity to raise money by second mortgage on the property as unencumbered. On 17th September 1911 the Court passed an *ex parte* decree against the defendant No. 1 who did not appear, but dismissed plaintiff's suit against defendant No. 2 on the grounds that the plaintiff was not deceived by any of the recitals in the deed of sale, that he had constructive notice of the mortgage to defendant No. 2 and that there was no gross negligence on the part of defendant No. 2. Against this decision the plaintiffs preferred an appeal to the High Court.

Sir Rashbehary Ghose (with him *Babu Dwarkanath Chakravarti, Dr. Sarat Chandra Basak* and *Babu Haramba Chandra Guha*), for the appellant. There are only three questions in controversy between the parties, *viz.*, (i) whether the mortgage of defendant No. 2 is fictitious, [(ii) whether defendant No. 2, is not estopped from setting up his mortgage against my client in the face of certain recitals in the conveyance from defendant No. 2 to defendant No. 1, and (iii) under section 78 of the Transfer of Property Act whether defendant has not forfeited his priority by reason of his parting with the title deeds whereby the mortgagor was able to mortgage the property to me as unencumbered. I submit that no prudent man would think of advancing by way of second mortgage Rs. 13,000 in cash on property which defendant No. 2

says was mortgaged to the hilt. In the Calcutta High Court the mere fact of registration is not a notice, though the contrary is held in Bombay. If you enable a man to commit a fraud on another you must be held liable though you are not to blame. Our case is that we had no knowledge whatever of defendant No. 2's alleged mortgage. We say it is a fraudulent transaction and fictitious, and even if it be found to be a *bond fide* mortgage defendant No. 2 cannot claim priority as he enabled the mortgagor to commit a fraud on me. There is no evidence that plaintiffs had direct notice of defendant No. 2's mortgage. But they say it was a registered mortgage and therefore we had constructive notice of it. The Subordinate Judge finds our mortgage was *bond fide* and for consideration, and therefore I submit we could have had no notice of defendant No. 2's mortgage considering the amount we advanced. (Reads section 3 of the Transfer of Property Act.) My clients would never have advanced Rs. 13,000 as a second mortgage on property already mortgaged to the hilt. The defendant No. 1 shortly after became an insolvent. An attesting witness must be present at the time of execution of the mortgage. Defendant No. 2 was never in possession, his mortgage being a simple one, and even if he was, it would not affect the validity of my security. The title deeds were made over to my client by the mortgagor, and the law lays down that the prior mortgagee loses his priority if he parts with the title deeds to the mortgagor. Gross negligence is merely negligence with a vituperative epithet.

[*Holmwood J.* See the decision in *Madras Building Company v. Rowlandson* (1).]

See Fisher on Mortgage, 6th edition, at page 573, re "assistance or connivance," and Dart on Vendors

(1) (1890) I. L. R. 13 M&I. 343 · (1891) I. L. R. 15 M&I. 263.

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and Purchasers at page 859. You must not allow the mortgagor to keep the title deeds for that would be arming him with authority to raise a fresh mortgage.

My position is much stronger than the case referred to by your Lordship.

[HOLMWOOD J. The point is clearly laid down in the first case.]

Another point is this. Defendant No. 2 ought also to be postponed because the conveyance by him to my mortgagor does not show that any part of the consideration money remained unpaid. The conduct of the parties must be taken into consideration to determine which party is entitled to the better equity.

[HOLMWOOD J. If the deed is fictitious defendant No. 2 cannot redeem.]

If it is not fictitious, he would only forfeit his priority, and would have to take, if I may say so, "a back seat;" see Lord Parker's observation in *Walker v. Linom* (1). But I submit that constructive notice of defendant's mortgage cannot be imputed to me. There was absolutely no wilful abstention from search, as we instructed our attorney who deputed one of his clerks to make the search at the Registration office; though it may amount to wilful abstention in Bombay if search was not made. The decision relied on by the learned Subordinate Judge [*Akhoy Kumari Debi v. Kanai Lal Kundu* (2)] is clearly distinguishable. I say that my opinion referred to by the learned Subordinate Judge is worth nothing.

[HOLMWOOD J. That is where we differ from you. This is not the first time you argue against your opinion. However, we differ from that ruling.]

Nor do I express such an opinion in my book. They cite my book and then deduce a proposition of law

from it. English Judges have protested against the extension of the doctrine of constructive notice which is full of refinements intelligible only to Equity lawyers. Actual notice gives also to enough trouble already without the extension of this doctrine to constructive notice. This refinement is intolerable. My clients must have been absolutely demented if with actual notice they had advanced Rs. 13,000 on a subsequent mortgage.

[IMAM J. If you get priority, it does not matter whether defendant's mortgage is floating, but he must have the equity of redemption.]

But I don't give up any point.

Mr. Pugh (with him *Moulvi A. K. Basut Hug* and *Babu Haradhone Chatterjee*), for the respondent I submit that the decision in *Akhoy Kumar Dabi v. Kanai Lal Kundu* (1), disposes of my learned friend's arguments completely. In this case I have the advantage of having Dr. Ghose's unofficial opinion in his book in my favour.

[HOLMWOOD J. But he says he never expressed any such opinion in his book.]

Though registration is not notice in Bengal, still if a man makes a search he has notice. I submit that notice to the attorney is notice to his client, the plaintiff.

[HOLMWOOD J. If the law in Bengal is that you need not search in the Registration office, then this peculiar condition laid down in Irish cases, does not apply for he could be heard to say that he is not responsible if his solicitor is negligent.]

It is argued that I should have kept the title deeds on taking the mortgage. My case is that the mortgagor asked for leave to take copies and I gave him the

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registration receipt to enable him to get back the documents. The obligation to keep title deeds does not exist outside the Presidency towns. In *Rangasami Naiken v. Annamalai Mudali* (1), the earlier Madras decisions have been considered.

The question under section 78 of the Transfer of Property Act is whether I was negligent and whether my negligence caused this mortgagee to advance the money. I submit that this was not the proximate cause but only contributory, the proximate one being the search in the Registration office and not finding this deed.

[HOLMWOOD J. I think it is a case of common honesty, the mortgage being on the same day as the conveyance.]

I submit that the conveyance was fair notice that cash consideration had not passed as it does not recite that the vendor had received consideration in cash: in fact there is no receipt for consideration there. See Key and Elphinstone's Precedents, Vol. I, page 614; *re* forms of conveyance, which begin with execution of receipt of consideration, and the old practice was in England to endorse on the deed a separate receipt of payment, till the Conveyancing Act made a statement in the body of the deed sufficient. If any one of plaintiff's three attorneys had made the enquiry required of them they would have ascertained what the real facts were: *vide* Elphinstone's Introduction to Conveyancing, page 89.

[Reads sections 54 and 55 of the English Conveyancing Act.]

[IMAM J. The man who drafted the deed says there is nothing in it to show that money had not been paid.]

It is for your Lordships to decide if that is so.

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[*HOLMWOOD J.* In India it is a question of fact ^{NANDA LAL}
as to what does put a man on his enquiry or not.] ^{ROY}

Yes, it comes to that. But in England where there ^{ABDUL AZIZ} is generally no registration great importance is attached to title deeds. This doctrine has not been introduced into the mofussil, though it has been in the Presidency towns in India: *vide* the decision of the late C. J., Sir Lawrence Jenkins, in *Monindra Chandra Nandy v. Troyluckho Nath Burat* (1) also *Balmakundas Almaram v. Moti Narayan* (2). In Bombay the mortgagor keeps the title deeds, so also in Bengal and Madras: *vide* the decision in *Rangasami Naiken v. Annamalai Mudali* (3), distinguishing the old Madras cases and where the Court holds that parting with title deeds is not gross negligence.]

[*HOLMWOOD J.* In all my experience in the mofussil I never heard anything about title deeds or objection as to their non-delivery.]

If there is no such practice in the mofussil then there is no negligence.

[*IMAM J.* The suburbs of Calcutta is very much affected by the practice prevailing on the Original Side, and the statement in your title deed shows that you recognised the Calcutta custom.]

[*HOLMWOOD J.* And you are relying on the Calcutta custom when you rely on the absence of the memo. of consideration. You did not leave the title deeds with the mortgagee but made them over to the vendee with the conveyance.]

In *Akhoy Kumari Debi v. Kanai Lal Kundu* (4) there is one important principle of law laid down, that not finding in search of registers is only a rebuttable

(1) (1898) 2 C. W. N. 750.

(3) (1917) 1. L. R. 31 M. & J. 7.

(2) (1893) 1 L. R. 1st Bom. 444

(4) (1912) 17 C. W. N. 224

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presumption. If your Lordships don't accept that view I ask you to refer this question to a Full Bench.

[HOLMWOOD J. I have Lord Cairns' authority that every case must be considered on its own facts. After making over the title deeds at the time of the conveyance you were setting up an unpaid vendor's lien in the form of a mortgage. A *suppressio veri* is an *expressio falsi*.]

The question is whether I have done anything that amounts to gross negligence so as to lose my priority.

[HOLMWOOD J. I can't separate in my mind the simultaneous suppression of the mortgage and the mentioning of payment of full consideration in the conveyance. There is a very narrow margin between that and misrepresentation.]

I made over the title-deeds to the mortgagor to make copies.

[HOLMWOOD J. Anybody could get copies from the Registration office on payment of fees.]

I believe this man had it in his mind to run a swindle from the start on the old man.

[Sir Rashbehary Ghose. There can be an equitable mortgage of property outside Calcutta by delivery of title deeds in Calcutta.]

[IMAM J. See section 18 of the Contract Act if misrepresentation is innocent also.]

Lord Eldon seems to indicate that there must be a fraudulent intention; the same view is taken in *Monindra Chandra Nandy v. Troyluckho Nath Burat* (1).

[HOLMWOOD J. But section 78 of the Transfer of Property Act lays down a clear difference between fraud, misrepresentation and gross negligence, and Sir Lawrence Jenkins refers to it.]

Further, the evidence of payment of consideration on the second mortgage is very weak.

[IMAM J. You did not cross-examine any of the witnesses who said the money was paid.]

We called upon the plaintiff's attorney to produce his day book.

[Sir Rashbehary Ghose. We did so, but not my learned friend.]

The important question is, what have I done that is wrong?

[IMAM J. Did you exercise sufficient care in this matter to prevent a fraud being committed on others?]

Yes, I did, and he should have carefully read the deed.

[IMAM J. See Sir George Jessel's observations in *Redgrave v. Hurd* (1).]

That is all gone; see *Derry v. Peek* (2). The Chancery Judges used to give relief in cases of innocent misrepresentation, but *Derry v. Peek* (2) requires proof of actual fraud.

[HOLMWOOD J. That is a common law action. Yet the cases you relied on are all Chancery cases. But section 78 of the Transfer of Property Act provides an equitable relief.]

I say in the words of the late C. J., that a man is not negligent who has taken the precaution of registration which is sufficient notice to a subsequent diligent purchaser or mortgagee."

[HOLMWOOD J. The decision in *Monindra Chandra Nandy v. Troyluckho Nath Burat* (3) follows the Bombay rule that registration is notice and breaks the Calcutta and Madras rule that registration is not notice. How could a single Judge practically overrule the decisions of this High Court?]

But he does not, for on the original side the Judges

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(1) (1891) 20 Ch. D. 1. (2) (1899) 14 Ap. Cr. 337, 359.

(3) (1893) 2 C. W. N. 750, 752.

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consider themselves bound, by English Law before the establishment of Mayor's Courts in 1776, and English decisions.

[IMAM J. And not by the decision of the Divisional Benches here?]

In gross negligence, "gross" is not merely a vituperative epithet as stated by Dr. Ghose. See *Farquharson v. King* (1) where the House of Lords have recognised one principle, viz., that it is not your duty to guard against criminal offences. You are only bound to protect a reasonably diligent person. The decision in *Akhoy Kumari Debi v. Kanai Lal Kundu* (2) says searching and not finding is notice all the same. The English law is that if you do not search it is not notice, but if you do search and do not find it is notice.

[IMAM J. Can it be said that the plaintiff's sanctioned the search, being made by his enemy's attorney's clerk?]

Akhoy Kumari's Case (2) lays down that if there is a search it must be presumed that the mortgage deed was found. See Dart, page 901. It is the duty of the solicitor to inform the client.

[HOLMWOOD J. But see Dart, page 896.]

Either there should have been a memo. of consideration stating how the money was paid, then nothing is to be inferred; but if there is not, then plaintiff was put on enquiry to ascertain how the money was paid: *vide Kennedy v. Green* (3) where it was held that the parties were put on enquiry. *Redgrave v. Hurd* (4), dealt with a question of rescission of contract on the ground of misrepresentation.

[HOLMWOOD J. We have found in the evidence, during the last three days, several acts of misrepresentation going to constitute this gross negligence.

(1) [1902] A. C. 325, 329.

(2) (1912) 17 C. W. N. 224.

(3) (1834) 3 My. & K. 699, 721.

(4) (1881) 20 Ch. D. 5.

It is a totally different matter whether an equity has here been raised in favour of plaintiff.]

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I ask your Lordships to apply the rule of law rigorously, and submit that the inference your Lordships are seeking to draw from the deeds is opposed to any system of conveyancing. *Akhoy Kumari's Case*(1) is absolutely conclusive. It is a presumption (*juris et de jure*) as stated in the Evidence Act, i.e., a rebuttable presumption, and if your Lordships differ therefrom I ask for a reference to the Full Bench.

Sir Rashbehary Ghose, in reply. The answer to the question as to which of two innocent purchasers is to suffer for the fraud of a third party is to be found in the well known maxim of law "He who trusts most shall suffer most."

I am not dealing with the subtle doctrine of constructive notice which is a reproach to English Jurisprudence, but with the fact that plaintiff parted with rupees 13,000 in hard cash. Defendant seems to think that one has only to lie hard to induce a Judge to accept his story. As I understand it the law is this—the mortgagee may be guilty of gross negligence if he parts with the mortgage deeds or allows them to remain in the custody of the mortgagor without reasonable ground. *Walker v. Linom* (2) is the most recent case in the English Reports which reviews all the earlier cases. The observations of Parker J. (now Lord Parker) are at page 110. As your Lordship, Mr. Justice Holmwood, remarked to Mr. Pugh, he might as well strike out the words "gross negligence" from section 78 of the Transfer of Property Act. I refer to Fisher on Mortgage page 573. The way to find out the value, as authority, of English decisions is to refer to leading text-books which show the accepted law on the subject. Therefore

(1) (1912) 17 C. W. N. 224. (2) [1907] 2 Ch. 104, 112.

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negligence amounting to fraud is absolutely meaningless, as one is the opposite of the other. But I rely on the Statute Law.

The decision of Jenkins J. in *Monindra Chandra Nandy v. Troyluckho Nath Burat* (1) is distinguishable on a variety of grounds.

[HOLMWOOD J. It is not in any way binding on us.]

For the meaning of "gross negligence," see *Colyer v. Finch* (2) where it is laid down that "gross negligence" is negligence with a vituperative epithet. But each case must depend on its own facts. There is no absolute negligence because it is always relative. See also *Perry Herrick v. Attwod* (3). A person who puts it in the power of another to raise money must take the consequence. Even if defendant No. 2 was not sufficiently diligent in getting back the deeds that mortgage would be postponed: *vide Fisher*, page 615, paragraph 1267. Regarding this disfigurement of English Law as to constructive notice, see section 3 of the Transfer of Property Act—where *notice* means actually knowing that fact, or a wilful abstention from facts. In *Akhoy Kumari's Case* (4) the Judges don't consider section 3 of the Transfer of Property Act, but they consider Irish cases and don't consider our Statute Law. I could cite 50 English cases on constructive notice which would puzzle the Judges, yet that doctrine has never been carried to the extent Mr. Pugh takes it. I submit, therefore, that it is only a question of presumption.

[HOLMWOOD J. It all depends on the facts.]

There is then no necessity to refer to a Full Bench.

[IMAM J. See the decision in *Manji Karimbhai v. Hoorbai* (5), where the matter is put very clearly.]

(1) (1898) 2 C. W. N. 750, 752. (3) (1857) 25 Beav. 205

(2) (1856) 5 H. L. 905, 924. (4) (1912) 17 C. W. N. 224.

(5) (1910) I. L. R. 35 Bom. 342.

It requires care. Most of these cases are discussed in the Tagore Lectures: but I would not like to entangle your Lordships or myself in the refinements that Courts of Chancery have made regarding constructive notice. In *Bailey v. Barnes* (1) Lindley, L.J. indicates what is meant by reasonable care. The doctrine of constructive notice must not be taken to defeat honest purchasers—a limitation which has been lost sight of in several cases.

Cur. adv. vult.

HOLMWOOD J. This appeal arises out of a suit brought by the plaintiff to recover Rs. 15,000 odd on a mortgage from defendant No. 1 by postponing an alleged mortgage executed by defendant No. 1 in favour of defendant No. 2, on the ground that the defendant No. 2 the original owner of the property had, by surrendering the title deeds into the hands of defendant No. 1 and suppressing the mortgage to himself and making it appear that the sale to defendant No. 1 was for a cash consideration of Rs. 32,000, afforded defendant No. 1 opportunity to raise money on the property by second mortgage as unencumbered.

The defence was that the defendant No. 1 had not really borrowed Rs. 13,000 from the plaintiff and was fully aware of the circumstances under which defendant No. 1 purchased and mortgaged the property in suit. Search having been made in the Registration office, the plaintiff was saddled with notice of defendant No. 2's mortgage and the possession of defendant No. 2 was also notice to the plaintiff. The defendant No. 1 did not appear, but the Court below passed an *ex parte* decree against him and dismissed the plaintiff's suit as against defendant No. 2 on the

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ground that the plaintiff was not deceived by any of the recitals in the deed of sale, that he had constructive notice of the mortgage to defendant No. 2, and that there was no gross negligence on the part of defendant No. 2. Against this decision the plaintiffs have appealed, and the points raised for our consideration are (i) Whether the defendant's mortgage is a real or fictitious one? (ii) Whether the defendant is not estopped against the plaintiffs by reason of certain recitals in the conveyance under which defendant No. 2 sold the property to defendant No. 1. (iii) Whether defendant No. 2 has not forfeited his priority by reason of his having parted with the title deeds and having been otherwise guilty of gross negligence so as to enable the defendant No. 1 to raise money on mortgage from the plaintiff on the footing that the property was unencumbered. It appears that the defendant No. 2, one Abdul Aziz, an old man of 70, purchased the property which consists of 12 cottahs 8 chittaks 10 square feet of land with an old masonry dwelling house upon it, known as 81, Kurrya Road, Ballygunge, in the Suburbs of Calcutta, but included within the Calcutta Corporation but not the Original Jurisdiction of the High Court, for Rs. 22,000 in the year 1909.

The property not letting at its proper value, the defendant No. 2 and his son who is a *mohurir* in the office of the Superintendent of Political Pensions and was formerly Assistant Record-keeper in the Alipore Magistrate's office, determined to sell it and according to the sale deed to invest the cash proceeds in other property. The defendant No. 1 made an offer of Rs. 32,000 which was evidently accepted by the defendant No. 2 on the footing that the whole was going to be paid in cash though the evidence on defendant No. 2's side is so conflicting as to what actually

happened that it is difficult to assert anything in connection with it except that the defendant No. 2 his son and the pleaders and other witnesses cannot all be speaking the truth.

The evidence of the pleader Jibanhari Mukerjee, who seems to have impressed the learned Subordinate Judge very much by his ingenuous ignorance of law and his far too frank admissions of careless neglect of his clients' interests, is of extreme importance in elucidating the very extraordinary transaction whereby the property passed under a registered *kobala* with full consideration to the defendant No. 1, yet is said to have remained in the possession of defendant No. 2 under a mortgage which purported to be a simple mortgage for the major portion of the consideration to be paid in instalments. This mortgage is sought to be varied by evidence of an oral agreement changing it into a mortgage with possession. The arrangement alleged by defendant 2's son is that the defendant No. 1 agreed to pay Rs. 2,500 in cash but being unable to do so he paid Rs. 500 only in cash, and gave a hand-note for Rs. 2,000. This hand-note is not forthcoming and the evidence regarding it is conflicting, some saying it was in favour of the defendant No. 2's son, others saying it was in favour of the father. For the balance Rs. 29,500 the defendant No. 1 executed a mortgage on the house to be paid in instalments without interest. Both the sale deed and the mortgage were registered on the same day, viz., 26th July 1911, and they purport both to have been executed on the 25th July, but it is a curious and wholly unexplained fact that the sale deed was executed in the pleader Jibanhari's office while the mortgage deed was executed in the office which the defendant No. 2's son calls his office but is really a part of the Magistrate's office at Alipore where the assembling of the parties for such a

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transaction must have been wholly unauthorised and carried out in secret without the knowledge of Golam Mohiuddin's superiors.

The pleader Jibanhari now wants to make out that he drafted the passage about the consideration for the sale with full knowledge of the intended mortgage and that he did not mention the mortgage because the mortgagee was to remain in possession.

The passage in the sale deed is marked (*a*) and purports to be the statement of Abdul Aziz. It runs as follows :—

"I being in need of money for purchasing other property, notified to sell the said property, and you having agreed to purchase the same for a consideration of Rs. 32,000 (thirty-two thousand rupees) I sell the said property for the said consideration to-day and by executing this deed in your favour I do hereby agree and promise that all rights ownership and interest and title which I had in the property sold, do hereby devolve upon you from to-day."

This, he says, was drafted on the vendor's son's instructions. As regards the other curious recitals contrary to the facts, marked (*b*) in the mortgage deed, he says that it does not represent the arrangement come to between the parties immediately before the execution of the conveyance and the mortgage deed. In the mortgage bond the defendant No. 1, mortgagor, says "The property is retained in my possession and I shall pay the Collectorate rent and the Municipal taxes, etc., from my own pocket. I deliver to you the documents mentioned in the schedule (*ga*) below as your title deeds. Yet the pleader says the arrangement immediately before the execution of the mortgage and the conveyance was totally different, and that the deeds as they stand were drafted "2 or 3 or 4 or 5 days" before the execution of the deeds. Nevertheless

he did not think it necessary to make any alteration in the drafts which, whatever their legal effect may be, are certainly calculated to deceive a subsequent mortgagee or purchaser; and, were fraud pleaded in a case like this, the recitals would certainly be evidence, for what they were worth, of possible fraud and would therefore perhaps come within the purview of the judgment of Jenkins J. in *Monindra Chandra Nandy v. Troyluckho Nath Burat* (1) which we shall refer to more at length later on when we come to consider the question of "gross negligence." Now turning to the evidence of the old man, Abdul Aziz, it appears that he executed the sale deed in Jibanhari pleader's office which is near his dwelling house in Kidderpore. He was not present when the mortgage deed was executed and he says the hand note for Rs. 2,000 was in favour of his son. All he got himself was Rs. 500 in cash and the registration receipt for the sale deed to protect his mortgage. This he would have us believe he handed over to defendant No. 1 because he wanted to make a copy of the sale deed. The loan was for 5 or 7 days, yet the defendant No. 1 was allowed to retain it for two months and eventually use it to raise money from the plaintiff, though a copy could easily have been obtained from the Registration office at a very small expense. But still more curious is the making over of a large number of documents, most of them in no sense documents of title, to the defendant No. 1 by the vendor's son independently of his father on the same flimsy excuse. One may well ask what could he want with promissory on demand notes and plans of proposed privies and other works never executed, when he was not to have a day's possession of the premises. The learned counsel for the respondent suggests that the defendant No. 2 and

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HOLMWOOD in September 1911 leaving the mortgage instalments
J. unpaid.

But if that is so, not only is the evidence of the defendant No. 2 and his son but that of the candid pleader's, on whom the Subordinate Judge relies, rooted and grounded in falsehood.

The absence of defendant No. 2 at the execution of the mortgage, its secret preparation as an after-thought in a Government office, where such a transaction had no business to be carried out, the hand note of Rs. 2,000 to the son, though the document recites that it was in favour of the father, convince us that the father having accepted Rs. 2,500 as earnest money and agreed to the remainder being paid in instalments on a simple mortgage bond without interest, was put off with a present payment of Rs. 500 and left the rest of the negotiation to the son. The whole transaction is full of suspicion and supported and excused by evidence much of which is deliberately false.

Not only is the mortgage with possession incapable of proof in face of the registered document but the evidence which is given in respect of it by the four most important witnesses in the case, the defendant No. 2, his son, and his two pleaders, is, as we have seen, false and has almost to be admitted to be false by learned counsel in order to get over the legal difficulty of the passing of the property by sale on full consideration. He at first endeavoured to defend the retention of possession on the ground that the non-payment of Rs. 2,500 in cash justified it. But the acceptance of a hand note and a mortgage as full consideration negatives this and there was no attempt to support the

pleader-witness's absurd contention that possession could be retained until the instalments of the mortgage were paid.

This is one point on which we find the defendant No. 2's case is damaged by false evidence, and another portion of the evidence which we cannot believe is the story of the receipt and documents being made over *bond fide* to the defendant No. 1 for taking copies. It is perfectly clear that the title deeds were handed over to him on execution of the deed of sale and that in the subsequent mortgage deed executed in another place he undertook to return them.

By the most extraordinary carelessness the old man Abdul Aziz and his incompetent pleader, Jibanhari Mukherjee, left the receipt for the deed of sale in defendant No. 1's hands with all its false and misleading recitals, and the question before us is whether the plaintiff cannot plead an equity to postpone the mortgage to defendant No. 2 which appears to contain perfectly true recitals though the defendant No. 2 and his witnesses have taken so much trouble to prove that they are false.

Now, we have to ask ourselves what is the meaning of all this apparently foolish misrepresentation and false statement. Ordinarily speaking such conduct would be evidence of fraud, but it is difficult to see what object was sought to be attained by this chicanery, and the plaintiff is of course unable to assign any fraud because he knows nothing of the secret dealings of the parties. But if there was no fraud it is difficult to avoid the inference that there was gross and culpable negligence in fact, and the sorry figure cut by the pleader, who is responsible for the documents, in the witness box lends colour to that inference. On the facts proved by the evidence for the plaintiff we have no hesitation in holding with

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the learned Subordinate Judge that the plaintiff was induced to advance Rs. 13,000 to defendant 1 on the strength of the clear title in his hand, and that the evidence which is amply sufficient is not rebutted nor even impugned in cross-examination. The learned counsel for the respondent urges that both plaintiff and defendant No. 2 have been defrauded by defendant No. 1 and that defendant No. 2 stands to suffer a very heavy loss compared with plaintiff who took a speculative mortgage with usual risks. The defendant No. 2's mortgage on the other hand was consideration for a valuable property belonging to the defendant No. 2 and he should not be the loser by postponement. This is on the merits. But on the law he strenuously argues that there is no defect in form in the conveyance and that although the recitals in it might be a very good answer to a claim for an unpaid vendor's lien, it is no answer to a valid registered mortgage. It is argued upon the authority of *Monindra Chandra Nandy v. Troyluckho Nath Burat* (1), to which we have already referred, that there must be fraud to bring the case within section 78 of the Transfer of Property Act, and that although the rule in this Court, contrary to the view held by the Bombay Court, is that registration is not *per se* notice, yet, where there has been a search, there is an irrebuttable presumption that the searcher had notice of the registered encumbrance, and for this the case of *Akhoy Kumari Debi v. Kanai Lal Kundu* (2) is cited and the reasons given by Dart in his work on Conveyancing.

A mere case of carelessness such as, it is argued, occurred here would not have such serious consequences particularly in a country where transfers of property are registered. Moreover, the plaintiff, it is alleged, has been guilty of neglect of the plainest

(1) (1898) 2 C. W. N. 750.

(2) (1912) 17 C. W. N. 224.

duties of a mortgagee in not demanding requisitions
of title though he acted through a Calcutta solicitor,
in not searching the Municipal registers and not
seeking for an explanation of the absence of any
express words showing payment of the consideration
money in cash. It was also argued, as we have seen,
that possession is notice. To deal with the last point
first. It is now conceded that the right to possession
passed absolutely to the vendee defendant No. 1 by
the sale deed, and the plaintiff has, in our opinion,
clearly established that when he went to see the pro-
perty with a view to advancing money on it, the
defendant No. 1 had the key, opened the door, and
showed the premises. From enquiries on the spot he
came to know that defendant No. 1 was in possession.
The Subordinate Judge is in error in saying that the
plaintiff's deposition shows that he merely paid a
flying visit for a few minutes and asked a casual
neighbour who the owner was and came away. The
whole incident of the broker and the key, which is
unrebutted, is ignored by the learned Subordinate
Judge. The defendant No. 2 has to admit through his
learned Counsel that he must have given possession
to defendant No. 1 otherwise he would be guilty of
defrauding the defendant No. 1 by taking money and a
hand note from him and a mortgage wholly without
consideration. That being so, the gravest suspicion
falls on the whole transaction, the recitals in the
documents being false, the evidence being false, and
the transaction being carried out in a most irregular
manner at a most irregular place. The pleader, who
is the first witness to the mortgage deed, admits
that he was not present at its execution but signed it
later on the admission of the executant. Whether the
son of defendant No. 2 wanted to defraud defendant
No. 1 and got Rs. 2,500 for an inoperative sale, let us

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now before us inasmuch as defendant No. 1 does not appear, but it is quite clear that at that time defendant No. 1 had no fraudulent intention. His fraud, if any, had its first inception when his pecuniary difficulties pressed hard upon him and the negligence of the defendant No. 2 and his son gave him the opportunity of deceiving the plaintiff. Upon this it has been argued for the respondent that you cannot get damages for an innocent misrepresentation at common law [*Derry v. Peek*(1)], and in *Farquharson v. King & Co.* (2), in the House of Lords, Lord Halsbury is referred to as saying that it is not your duty to guard against criminal offences. It cannot be negligence to trust a person who can only take advantage of you by means of a crime. Now the answer to the first part of this contention is that no one is seeking damages for misrepresentation or negligence in this case. A purely equitable relief is sought for here, and we have nothing to do with any question of damages or compensation at common law. In the same way the Criminal Act of fraud if any was committed by defendant No. 1 against the plaintiff and not against defendant No. 2. Defendant No. 2 was never deceived. He accepted full consideration for his sale and thought he had made a very good bargain. The argument, if it had any force at all, would tell in the plaintiff's favour. But there is nothing to show that defendant No. 1 is amenable to the Criminal Law. He did not seek out the plaintiff or make any representation to him. The plaintiff saw the property, satisfied himself as to the possession, placed the verification of title in the hands of his solicitor and there is nothing on the record to show that the defendant No. 1 ever brought himself within the clutches of the Indian Penal Code. Indeed the respondent had to admit that it would be

very difficult on the facts to get a verdict of cheating against the defendant No. 1. The defendant No. 2 had secured what he considered a very good bargain for his rather unprofitable property. The pleader Jibanshari Mookerjee says both parties were his clients and the whole transaction was open and above board. The son of defendant No. 2 says he had known the defendant No. 1 two years before the sale. He had a new *arat* or jute business at Munshiganj in Dacca district and a Press and tailoring business in Calcutta—nothing was then known of his being unable to meet his liabilities. Defendant No. 2 does not seem to have any good case for sympathy on the merits. That being so let us examine the legal contentions which arise on the Subordinate Judge's judgment.

We are not called upon to hold that the prior mortgage of defendant No. 2 was not a *bond fide* and valid document though the circumstances under which it was created and the conduct of the defendant No. 2's son in respect of it, are suspicious. The first important question of law is as to notice

Section 3 of the Transfer of Property Act says—“A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.” Now it is perfectly certain that plaintiff did not actually know that the property was mortgaged to within a few rupees of the nominal and greatly enhanced value. If he had, he would have been mad to have advanced Rs. 13,000 on it; and, being a money-lender, it is not likely that he was blind to his own interest. The only way in which this substantial finding of ignorance in fact could be met would be by arguing, as it was argued, that defendant No. 1 was colluding with the plaintiff and not defendant No. 2.

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There is no evidence of this, and the Subordinate Judge has rightly held that there is strong evidence to the contrary, though he is wrong in saying that there are "a host of independent witnesses" on the point. If in fact therefore he did not know, how is he to be saddled with constructive notice? In two ways it is argued:—(i) Because he had a search made in the Registration office, and, on the authority of *Akhoy Kumari Debi v. Kanai Lal Kundu* (1), that resulted in a presumption of notice of the contents of the book, and it could not be rebutted by the mere statement that though a search was made it was unsuccessful. We may accede to this narrow proposition although it is based upon Irish decisions by which, as the learned Judges point out, we are not bound. But if it was sought by learned counsel to erect this very simple presumption by way of caution against fraud into an irrebuttable presumption that the person who had a search made had notice in every case, and if we held otherwise we were strongly pressed to refer the decision cited to the Full Bench. In support of this contention we have referred to Dart on Vendors and Purchasers, p. 901 where he says: "The duty of the solicitor being to inform the client of the defect in the title, the presumption that he has done so is treated as being *one juris et de jure*, the danger of perjury being too great to admit of the presumption being rebutted by evidence." The passage in Dart has of course no reference to this question of registration and search. That is, as the Judges in *Akhoy Kumari Debi v. Kanai Lal Kundu* (1) point out, a simple presumption of fact depending upon the circumstances of the particular case. We cannot put it better than in the words of the learned Judges themselves as to what was then before them. They say: "All that is said here is

that a search was made but without success. There is no attempt made to explain this want of success, no suggestion of any special or qualifying circumstance which would justify the treatment of the case as exceptional."

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Here very much the reverse is the case. All the title deeds were before the attorney and he approved the title. He was then instructed to search for incumbrances and he employed the managing clerk of the defendant No. 1's attorney to make the search. To excuse his conduct he states that this Haripada Chatterjee is joint clerk of himself and Ramesh Babu, the attorney of the common adversary defendant No. 1. He admits that the plaintiffs ordinarily search through their own man, Upendra Talukdar. He being away the attorney was asked to make the search and he admits that the responsibility for the search is, theoretically his. When he employs the principal clerk of the attorney of defendant No. 1, who was strongly interested to see that the encumbrance was not discovered we can easily see how easily this Haripada, who identified defendant No. 1 at the Registration office on the 21st September 1911 and then described himself as managing clerk of Romesh Chandra Bose, solicitor, and nothing else, could be induced by defendant No. 1 to suppress the incumbrance. No man of the plaintiff was allowed to go with him though plaintiff has numerous men looking after his legal business.

The evidence in regard to this search is so suspicious that we are inclined to agree with the Subordinate Judge that it is extremely doubtful whether there was any search at all. At any rate no presumption can be raised against the plaintiff on a search made by the managing clerk of the enemy's attorney. Secondly, it is said section 3 does not apply on account of gross

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negligence. Now this is alleged to be the non-inspection of the Municipal papers—not obtaining requisitions of title and not requiring an explanation of the absence of express words as to the passing of consideration.. The Municipal papers have been printed by the respondent in a separate book and they show nothing except that Abdul Aziz was registered in 1909 and that he paid the taxes for the quarter before the sale and for the quarter after, the house being admittedly unoccupied by a tenant. The sale was in the middle of the quarter and so was the disappearance of defendant No. 1, so that nothing would appear from the Corporation papers and the plaintiff was entitled to assume from the recent transfer from Abdul Aziz to defendant No. 1 in July that the name of Abdul Aziz would still appear during the quarter July to September, and the registers could show him nothing.

Requisitions of title are a matter for the solicitor. He was instructed to get them but informed the plaintiff on the title deeds that the title was good. The sale deed was registered at a mofussil office and there is no practice outside Calcutta, and certainly no such presumption, as that laid down by Dart for England, that the solicitor has made requisitions of title. In this case the fact remains that he had not, though he appears to have made the plaintiff believe that he had, and appears to have been acting hand-in-glove with defendant No. 1's attorney to the detriment of the plaintiff. Neither the attorneys for the plaintiff nor the pleaders for the defendant No. 2 come very well out of the witness box as regards the recitals in the sale deed. Whatever may be the strict legal effect of such statements in England we are unable to hold that the plaintiff was put upon any enquiry as to the consideration by reason of the absence of a memo. of consideration. It may have been

the duty of the attorney, Sailendra, to look into the matter but his evidence shows that he clearly neglected his duty and made light of his responsibility. We are of opinion that the words used were deliberately inserted to give the impression that the consideration had passed in cash, and we derive from Jibanhari pleader's evidence that that was the original suggestion made to satisfy the old man, defendant No. 2.

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It does not therefore matter whether the words according to strict English rules of conveyancing can bear that interpretation in law; the question is what the parties on the one side intended to be believed, and the parties on the other side were induced to believe by the words used. On the whole therefore we are able to find as a fact that the plaintiff had no notice of the defendant No. 2's prior encumbrance, that steps were taken throughout the transaction to keep the knowledge from the plaintiff, and that he cannot be saddled with constructive notice by reason of any search improperly made by a man from the enemy's camp, or any omission to make enquiries which were infructuous in the one case, and on the face of the documents superfluous in the other. The other main point of law on which the Subordinate Judge has held against the plaintiff is with regard to the application of section 78 of the Transfer of Property Act.

That section says:—"Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee."

Now, there is no allegation or proof of any actual fraud on the part of the prior mortgagee in this case.

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though his conduct is such as it is difficult to explain without assuming that he had the intention to deceive someone to his own or his son's advantage nor is there any misrepresentation as defined in section 18 of the Contract Act, though there is a great deal of misrepresentation in the ordinary sense of the word. The question remains is there any "gross negligence?"

Now, whatever definition we take of the three ingredients in the section fraud misrepresentation, or gross negligence it is clear that the section makes them disjunctive and that one cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive. The ruling therefore in *Monindra Chandra Nandy v. Troyluckho Nath Burat* (1), which was the decision of a single Judge sitting on the Original Side of this Court and governed more directly by English practice and precedents than we are, cannot be taken to mean, as was argued by learned counsel, that there is no postponement apart from fraud. The learned Judge, who after holding the offices of Chief Justice of Bombay and of this Court has now been elevated to the Judicial Committee of the Privy Council, cannot be for one moment suspected of ignoring the clear distinction drawn by section 78 of the Transfer of Property Act between the three different kinds of conduct which raise an equity against the prior mortgagee. It is true that the English cases, which he cites not as authorities but guides, do seem to import the idea of fraud if only by implication; although the distinction drawn by section 78 is clearly made by Lord Justice Turner in *Hunt v. Elmes* (2); but all that is derived from these cases is that the mere omission on the part of the mortgagee to take and keep

(1) (1899) 2 C. W. N. 760.

(2) (1860) 2 D&G. R. & J. 578.

the title deeds is not of itself gross negligence and the existence of gross negligence must be determined according to the circumstances of each case—and one of the circumstances to be taken into consideration here, is the fact that in this country a universal system of registration exists. Some remarks follow which might be construed to imply that the learned Judge was re-importing the Bombay view, that registration is notice, into this court which has always held to the contrary; but a careful consideration of the facts of that case preclude us from ascribing any such intention to the learned Judge. The Maharani in that case was not the owner of the property. She took a mortgage after every proper enquiry and perfected her title by registration, and the only fact against her was that her agent followed the mofussil practice and returned the title deeds to the mortgagor. Here the owner while transferring his property by sale took particular pains to conceal what the real consideration was, and though he registered the mortgage, deliberately suppressed all reference to it in any statement of consideration, and for some unknown reason made it appear on the face of the title deeds that there was no such mortgage. His handing over the sale deed to defendant No. 1 enabling him to give an equitable mortgage to plaintiff in Calcutta where the parties reside, and actually inducing him to advance Rs. 13,000 on the strength of the title deeds was therefore, we think, gross negligence, and we are fortified in this opinion by the more recent case of *Walker v. Linom* (1), where Parker J., as he then was, points out that the fraud mentioned in the older cases cannot have been such conduct as would justify a Judge and jury in finding there had been actual fraud, but such conduct as

(1) [1907] 2 Ch. 104.

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would justify the Court of Chancery in concluding that there had been fraud in some artificial sense, as in the case now before us, where it is difficult to account for the duplicity and concealment of the defendant and his son on any other supposition than that they intended to defraud some one, but at the same time, on what we can only gather from the record, there is nothing to show what that fraud was or in fact whether there was any fraud in the ordinary sense of the word at all.

Then again as regards the ridiculous story that the defendant No. 1 was allowed to keep the title deeds for two months to make copies which he had undertaken to make in 5 or 7 days. Parker J. says: "There are subsequent cases which suggest that at any rate in cases of postponement based on no enquiry having been made for the deeds, fraud is not necessary. "It is for example clear from the case of *Oliver v. Hinton* (1) that a purchaser obtaining the legal estate, but making no enquiry for the title deeds, and making enquiry and failing to take reasonable means to verify the truth of the excuse made for not producing them or handing them over, is, though perfectly honest, guilty of such negligence as to make it inequitable for him to rely on his legal estate so as to deprive a prior incumbrance of his priority. In that case Lindley, M. R. said that to deprive a purchaser for value without notice of a prior incumbrance of the benefit of the legal estate, it is not essential that he should be guilty of fraud."

Here defendant No. 2 or his son who did all his business for him, had full notice by giving the instalments that defendant No. 1 was not a good paymaster and might be unscrupulous in raising money for his needs, yet he persistently neglected to secure the

return of the title deeds, being put off with slimy excuses that copies could not be taken owing to certain deaths in the family. As the learned author of Fisher on Mortgages points out at page 573, section 1122 of his work, Parker J. reviews elaborately all the previous authorities and displaces the more narrow view previously held as to the necessity for fraud being shown. The only other English case we need refer to is that of *Colyer v. Finch* (1) where Campbell L. J. says cases are very difficult to deal with when you are obliged to use vituperative epithets (like "gross") in order to enunciate a principle. What constitutes gross negligence is always excessively difficult either to define or by way of anticipation to illustrate, but it appears to me at present that none of the cases, as far as I am aware of them, would entirely justify what was done by the mortgagee here; and under the circumstances of that case he held, as we must hold under the circumstances of this case, that the leaving of the title deeds with defendant No. 1 was an act of gross negligence. Of Indian cases we have had cited before us and considered the cases of *Madras Building Company v. Rowlandson* (2), *Rangasami Naiken v. Annamalai Mudali* (3), *Manji Karimbhai v. Hoorbai*, (4) [the last on the question of notice]. All these cases deal with the points on the particular facts and circumstances of those cases, but what we derive from them is that, in a case like the present neglect to recover the title deeds by a vendor from a vendee who has secured the greater part of the purchase money to the vendor by giving him a mortgage on the property itself, when the vendor has full notice that the vendee is impecunious and a bad paymaster

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(1) (1856) 5 H. L. 905, 924 (3) (1907) I. L. R. 31 Mad. 7.

(2) (1890) I. L. R. 13 Mad. 383 (4) (1910) I. L. R. 35 Bom. 712, 744.
(1891) I. L. R. 15 Mad. 254

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and thereby the vendee is enabled to obtain a second mortgage on the property by deposit of the title deeds, is gross and culpable negligence, and is rendered more so by a deliberate *suppression of the existence* of the mortgage in the sale-deed and a suggestion that the purchase money was required in cash and paid accordingly.

Further, that registration not being in itself notice a search made by the clerk of the solicitor to the vendee who has an interest to conceal the encumbrance from the second mortgagee cannot saddle the latter with notice of the encumbrance. These two findings dispose of the appeal which must accordingly be decreed so far as the Lower Court refused to give relief to the plaintiff against defendant No. 2, and it will be declared that the mortgage bond of the 25th July 1911 to the defendant No. 2 be postponed to that of the 21st September 1911 in favour of the plaintiffs. That this day six months be fixed as the time for defendants 1 and 2 jointly or severally to pay to the plaintiff the sum due on his mortgage with interest and costs, and if the amount is not paid on that date the mortgaged property will be sold.

IMAM J. concurred.

G. S.

Appeal allowed.

PRIVY COUNCIL.

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(AND ANOTHER APPEAL CONSOLIDATED).

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[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA, AT RANGOON.]

Mahomedan Law—Endowment—Public mosque—Right of management—Civil Procedure Code 1882, s. 559—Suit for appointment of Trustees and for settlement of a scheme of management—Community composed of Sunni Mahomedans from various districts and places—Trust deed giving management exclusively to Rhanderias—Decree of Kazi under Mahomedan Law—Discretion of Court—Obligation to adhere to intentions of founder; and objects of Trust—Right to vary details of management in accordance with changing conditions and circumstances.

This appeal which arose out of a suit brought under section 539 of the Civil Procedure Code, 1882, for the appointment of trustees, and the settlement of a scheme of management related to the Sunni Jumma Masjid at Rangoon which was admittedly a public mosque dedicated to the performance of religious worship by all Sunni Mahomedans without restriction as to place of origin. The land on which the mosque was built had been granted by the Government on trust for that purpose in 1862 and it was, together with other land adjoining, purchased in 1871 from the Government by five members of the Sunni Mahomedan community who by a deed of trust in March 1872 dedicated it, and the mosque erected thereon, for the purpose of divine worship by all Sunnis Mahomedans, and vested the control and management of the mosque solely in Rhanderias (Sunnis Mahomedans from Rhander near Surat).

Held, that the transactions which took place in 1871 and 1872 in no way affected the original and then existing trust, and that the trust deed did not create a new dedication, but the mosque remained as before a public mosque dedicated to the performance of worship by all Sunni Mahomedans as originally founded.

* Present: VINCENT HALDANE, SIR JOHN ELLIOT, MR. AVNER ATT AND
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With respect to a public religious trust, as distinguished from a private trust, the discretion, under the Mahomedan law, of the Kazi (a discretion now exercised by the Civil Court) was very wide; for though he could not depart from the intentions of, or the rules made by, the founder as to the objects of the benefaction, yet as regards its management, which must be governed by circumstances, he had complete discretion, his primary duty being to consider the interests of the general body of the public for whose benefit the trust is created. In his judicial discretion he might vary any rule of management which he finds either not practicable or not in the best interests of the institution.

Held, therefore, that in settling a scheme of management the question was not one involving the determination of conflicting rights, but the consideration of the best method for fully and effectively carrying out the purposes of the trust. Section 539 vested a very wide discretion in the Court, and in giving effect to its provisions and appointing new trustees and settling a scheme the Court was entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management had been carried on heretofore in conjunction with other existing conditions that might have grown up since its foundation. The Court also had the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future.

Held, also, that on the facts and in the circumstances of this case the Rhanderia section of the worshippers, all other conditions being equal, were preferably entitled to the management of the mosque.

Ibrahim Esmael v. Abdool Carrim Peermamide (1) distinguished.

The case was accordingly remitted to the Chief Court to form a scheme by which the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which should be in the discretion of the Court with due regard to local needs and conditions, subject to the provision that so long as circumstances do not vary a majority of such committee should be Rhanderias; and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any supervisory functions that it may be necessary to confide to them and for filling up vacancies in their body subject to its control.

Two consolidated appeals, 79 and 80 of 1914, from two decrees (29th May, 1912) of the Chief Court of

(1) [1908] A. C. 526; L. R. 35 I. A. 151.

Lower Burma in its appellate jurisdiction, which reversed a decree (25th April 1910) of the same Court in its original jurisdiction.

The plaintiffs and the defendants 1 to 4 were the appellants to His Majesty in Council.

The only question for determination in these appeals was as to whether a particular section of the Sunni Mahomedan community in Rangoon who came from Randher, near Surat, had the sole right to the control and management of the Sunni Jumma Musjid at Rangoon, a mosque dedicated to the worship of the whole Sunni community in that place generally.

The facts out of which these appeals arose were as follows:—On 26th May 1862 the Government of India granted to Moolla Ibrahim Goolam Moidin Moollah, and Cassim Abzim certain land in Rangoon known as 1st class lot No. 12 of Square C. 1 on trust to build and maintain thereon a mosque for the free use of all persons professing the religion of the Sunni sect of Mahomedans. The grant contained a proviso that if a good and substantial mosque was not erected on the land within one year from that date or if the land be at any time thereafter put to any use or purpose other than that for which the trust provided, it should be lawful for the Deputy Commissioner of Rangoon to revoke the grant and the land should revert to the Government. On the same date, the Government of India also made another grant to the same three persons of other land known as 4th class lot No. 12 of Square C. 1 upon the same trusts and provisos.

From the date of these grants, and at least 15 years prior thereto, there existed on the land so named a mosque called the *Sunni Jumma Musjid*, which was used by the Sunni Mahomedans of Rangoon generally, on behalf of whom the

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the grantees of the above two pieces of land were acting as trustees.

On part of the land so granted and adjacent to the mosque, these trustees had built some godowns or shops which had been let to tenants, and the rents of which were applied to upkeep and maintenance of the mosque. In 1870 a question was raised by the Revenue authorities in Rangoon that these godowns and shops constituted a breach of the provisions contained in the grants; and notice of an inquiry to be made was served on the trustees of the mosque which inquiry was attended by Cassim Abzim. The inquiry was as to whether the buildings other than the mosque should be removed or whether they should be allowed to remain subject to payment of an increased municipal tax. Arrangements were eventually made with the Government for the purchase of the land on special terms, which were far less than the ordinary of the land at that time.

On 3rd February 1871 the land, the subject of the two grants above mentioned, was sold and conveyed by the Government to five persons, Mahomed Ebrahimji Dooplay, Hassim Arief, Mahomed Patalil, Mahomed Hossein and Ebrahim Ally Moollah, who were influential members, and acted on behalf of the Sunni Mahomedan community, for Rs. 2,156-1, and Rs. 150 respectively.

By a deed dated 16th March 1872 to which the five persons above named were parties of the one part, and Mahomed Hassim as a trustee for the "Soonee Mussalman community" of the other part, it was recited that the lands had been made over to the persons named to be held or retained solely for such purposes as the ground was originally acquired from Government in the same manner as parcels of land were obtained by various sects in Rangoon; and it

was witnessed that the land upon a portion of which the Sunni Jumma Masjid was erected, or was in course of being built, and also the godowns attached thereto were dedicated for divine worship. The deed also contained further provisions declaring that the entire control and management of the musjid should be vested in a body called the "Randeere Soonut Jammauth Wora Panchayet," composed of a section of the Sunni community who came from Randher near Surat.

Subsequent to 1871 a new mosque was built on the land out of subscriptions collected from the Sunni Mahomedan community generally.

On 30th September 1908 the plaintiffs-appellants Mahomed Ismail Ariff, Ahmed Ebrahim, Mahomed Ebrahim, Ali Hashim Ariff, and Mahomed Yusuf claiming to be Sunni Mahomedans of Randher, instituted the suit, out of which the present appeals arose, against Ebrahim Ally Moolla, Moolla Abdul Rahim, Mahomed Yusuf Esmail, and Esuf Hashim Dooplay, the defendants-appellants, and three others. The two respondents Ahmed Moolla Dawood and Mahomed Vally Mahomed, who were members of the Sunni Mahomedan community of Rangoon, but did not belong to Randher or Surat, and the remaining respondents who were Sunni Mahomedans from Sarat but not from Randher, were joined as defendants during the course of the proceedings.

The plaintiffs admitted that the musjid in suit had been established for many years for the use of the Sunni Mahomedan community for the purpose of worship, but claimed that the "Randher Sunni Wora Jummah" alone was entitled to the control and management of the trust connected therewith, and prayed for the settlement of a scheme, and for the appointment of trustees on that basis.

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The contest in the suit lay between the plaintiffs and the defendants 1, 2, 3 and 4 on the one side, and the respondents on the other.

The only issue raised for trial was "Have all Sunni Mahomedans of Rangoon or the Surat Vora community, other than the Randher Sunni Vora Jummat any voice in the management and control of the Surati Jumma musjid?"

The trial Judge (ROBINSON J.) held that the provision in the deed of 1872 as to the management of the mosque was good and valid; that the management vested in the Randher Sunni Vora Panchayet alone; and that a draft scheme on that footing should be submitted to and settled by the Court.

A decree was accordingly made in favour of the appellants.

From that decision both sets of the respondents appealed, and the appeals were heard by SIR CHARLES FOX (Chief Judge) and HARTNOLL J. who held that the lands granted by the Government under the two deeds of 26th May 1862 were granted upon trust to build and maintain thereon a mosque for, and to the free use of, all persons professing the religion of the Sunni sect of Mahomedans; that the grants of the 3rd February 1871 were subject to the same trust; and that the deed of 16th March 1872 which purported to assign the management and control of the mosque and lands to the nominees of the Rhander Sunni Jummat Vora Panchayet (which comprised only a portion of the beneficiaries under the trust), was invalid and inoperative. The Chief Court on its Appellate Side accordingly passed two decrees in the appeals, in each appeal setting aside the decree of ROBINSON J. and declaring that all Sunni Mahomedans were entitled to a voice in the management and control of the Jumma Musjid at Rangoon, the right not being

confined to the Randher Sunni Vora Panchayet as claimed.

On these appeals,

Sir R. Finlay, K. C., Arthur Page, and Abdul Majid, for the appellants, contended that the deed of 16th March 1872 constituted a wakf for religious purposes according to the Mahomedan law, and its provisions vesting the management and control of the mosque and lands in suit in the Rhander Sunni Jammauth Vora Panchayet were valid and operative. In a case of the dedication of a mosque the right to worship in it is in all Mahomedan believers; but a right to worship in the mosque did not necessarily carry with it any right of management: the right to worship was distinct from the right to manage and control the endowment, and the deed of 1872 did not, and did not purport, to infringe or interfere with the right of all Sunni Mahomedans to worship in the mosque in suit: and there was nothing repugnant to Mahomedan law in such a mosque being managed by Rhanderias; it was in fact preferable that the management should be vested in such a well specified and ascertainable body as the Rhander Sunni Jummanth Vora Panchayet rather than in vague and unascertainable bodies like the Sunni Mahomedan community, the Sunni Community of Rangoon, or the Surat Sunni community of Rangoon. It was the intention of Moolla Hashim, the founder of the original mosque, that it should be managed and controlled solely by Rhanderias, and the provisions of the deed of 1872 were consistent with, and in furtherance of, his intentions and in accordance with the established practice of the mosque which had always been managed by Rhanderias, who had almost wholly provided the funds to purchase the land, and to build and maintain

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the mosque. It was competent by Mahomedan law for a person creating a wakf to provide for the future management of the property which he dedicated to religious purposes, and in this case such provisions had been made for the management and control of the mosque by Rhanderias. It was also contended that under the two deeds of 3rd February 1871 an absolute title to the lands thereby sold was granted to the purchasers free from any trust or condition, and any trust of the lands by the deeds of 26th May 1862 which may previously have existed, came to an end when those deeds were cancelled and the lands resumed by the Government. The Court in settling a scheme of management was, no doubt, not bound to follow the rule of succession as appearing from the history of the endowment, but in exercising the right of the Kazi under the Mahomedan law the Court ought to have regard to the intentions of the founder and the rules made by him for succession to and management of the wakf: see *Gulam Rahumtulla Sahib v. Mahomed Akbar Sahib* (1), *Advocate-General v. Fatima Sultan Begam* (2), and Ameer Ali's Mahomedan Law, pages 452, 461. As to the right of management, reference was made to *Ibrahim Esmael v. Abdool Carrim Peermamode* (3) a Mauritius case, which was distinguishable, there being in that case no question of a succession of managers, and the whole congregation contributed to the levy for maintenance of the mosque. Any scheme settled for the management of the trust ought not to be inconsistent with the terms of the deed of 1872, the validity of which it was not competent for the respondents to challenge in this suit; and the trustees should, if possible, be the same persons.

(1) (1875) 8 Mad. H. C. 63.

(2) (1872) 9 Bom. H. C. 19.

(3) [1908] A. C. 626;

L. R. 35 I. A. 151.

A. M. Dimne and *F. J. Coltman*, for the respondents, contended that the Jumma Musjid of Rangoon and the lands appertaining to it formed a trust in which the whole Sunni Mahomedan community of Rangoon were interested; and the transactions of 1871 and 1872 in no way affected the rights of that community in the trust property, or freed the lands and mosque from the pre-existing trust. The Government never resumed, and never intended to resume, the land; there was no change intended or effected in the position of the Jumma Musjid itself, which was unaffected by the question relating to the erection of the shops, and there was no change in the nature of the trust connected with the musjid. The terms of the deed of 16th March 1872 were never submitted for the approval of the Sunni Mahomedan community at Rangoon nor was it drawn up with their knowledge or consent, and they never selected or appointed Mahomed Hossein to represent them in drawing it up. The control and management of the mosque and of the trust properties were vested in the Sunni Mahomedan community at Rangoon generally, and were not confined to the Randher Sunni Vora Panchayet. The fact that the Rhanderias always have held the management of them did not necessarily show that such was the will of the founder: see the case of *Ibrahim Esmael v. Abdool Carrim Peermamod* (1) which, it was submitted, was applicable to the circumstances of the present case. The right to appoint trustees for the management of the mosque was in the officials of the mosque: Act XX of 1863 had abolished the right of any Government Officer to appoint to the management. Reference was made to their grounds of appeal to show that the case on which the appellants relied in the lower Courts was not the same as that now set

(1) [1909] A.C. 526, I. R. 35 I.A. 151

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up. The "date of the foundation" of the mosque alluded to therein was 1871. As to there being a rule of succession antecedent to 1871, it had not been proved. The appellants had not, it was submitted, made out their case that there was ever a settled rule of succession in management.

Arthur Page replied.

The judgment of their Lordships was delivered by

May 15.

MR. AMEER ALI. The suit which gives rise to these consolidated appeals was brought in the Chief Court of Lower Burma in its original civil jurisdiction, under the provisions of section 539 of Act XIV of 1882, for the appointment of trustees and the settlement of a scheme of management in respect of a mosque, situated in the city of Rangoon. The plaintiffs in the action are five Mahomedan worshippers at the mosque, who trace their origin to a place called Randher, said to be a suburb of the city of Surat in the Bombay Presidency, and in the earlier stages of these proceedings they appear to have claimed it as a Randheria mosque. It is, however, conceded now that it is a public mosque dedicated to the performance of religious worship by all Sunni Mahomedans without restriction as to place of origin, and that it is commonly known as the Sunni Jumma Musjid.

To explain the contest between the parties it is necessary to give a short summary of the circumstances that have led to this unfortunate litigation. Like many other places in Burma, Rangoon is inhabited by a large number of Mahomedan emigrants from various parts of India who have domiciled themselves in the country for purposes of trade, and are generally known by the names of the towns or villages whence they originally came. For example, the plaintiffs, as already stated, derive their origin-

from Randher and, therefore, call themselves Randherias; whilst the larger community of Suratis or Soortees come either from the city or district of Surat. It is necessary to bear this in mind, as the mosque in question is sometimes called the Surati mosque. The Randherias, though trying to differentiate themselves from the others, form in reality a section of the Surati community. They are mostly Voras, and they all profess the Sunni doctrines.

It appears that the site of the present mosque was formerly occupied by a bamboo structure built in 1851 by one Moolla Hashim, a native of Randher. It was dedicated to the same purpose, and bore the same name as the present masonry mosque. Divine worship was performed here by all Sunni Mahomedans until it was burnt down three years later, when Moolla Hashim replaced it with a building made of wooden planks. This continued to be the public place of worship until 1872, when the masonry mosque was erected.

The land on which the mosque was first built appears to have been afterwards added to by purchases made by Moolla Hashim or by his fellow-townsmen, who made the same over to him as the custodian of the mosque. In 1862 one Moolla Ibrahim, a brother of Moolla Hashim, and two persons of the names of Golam Moideen Moollah and Cassim Azim, obtained from the Government a grant in respect of certain other plots on the express trust "to build and maintain thereon a mosque or place of worship for, and to the use of, all persons professing the Sunni sect of the Mahomedan religion.

These lands were also added or attached to the existing mosque, and shops were built there to yield an income for its maintenance.

In 1864, Moolla Hashim went on a pilgrimage to

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Mecca, leaving the management of the mosque in the hands of Moolla Ibrahim and the two persons already mentioned. He returned to Rangoon in 1866, but never resumed his management of the mosque. At this time the person in charge was one Mohammed Hashim Mehtar, who also is said to have been a native of Randher.

In 1870, the Government, finding that no mosque had been built on the lands granted in 1862, and that on the contrary shops had been erected thereon, issued a notice on the grantees to show cause why those lands should not be resumed. A meeting was thereupon held, apparently at the instance of the Randherias, of all the Sunni Mahomedans entitled to worship at the mosque, and it was decided to buy outright from the Government the land, and build on it a proper masonry structure suitable to the growing needs of the community. Although there is some dispute with regard to the contributions of the general body of Sunnis apart from the Randherias, it may be taken as fairly uncontested that the bulk of the fund was subscribed by the Randheria section of the worshippers. The conveyance was taken in the names of five persons, named respectively Dooplay, Aiff, Pattal, Mohammed Hashim and Ebrahim Ali Moolla, and these men in 1872, whilst the masonry mosque was in course of building, purported to create a new dedication.

The trust deed bears date the 16th March, 1872 and after reciting that it was made between the persons named above, of the one part, and one Mohammed Hashim, representing the general Sunni Muselman community, of the other part, proceeds to declare that "the pieces or parcels of land upon a certain portion of which the Sunni Jumnaet Musjid is erected or is in the course of being built, together with the

godowns attached thereto, are solely dedicated for the purpose of divine worship." It then goes on to provide, *inter alia*, that its management shall remain exclusively in the hands of the Randheria Jamaat (people or assembly).

The five persons in whose names the conveyance stood and who had executed the trust deed appear to have carried on the management for several years; in course of time some dropped out and others came in as trustees. How these men were placed in charge of the management of the mosque is not clear, for apparently no meeting of the Randheria Punchayet was held until 1894, and none between 1894 and 1906, nor in fact had the Randherias any "organised association" with written rules for the purpose of giving effect to the wishes of their section of the community.

Matters remained in this condition until 1908, when disputes arose regarding the validity of the election of one Hashim Yacub Ally as a trustee in place of another Randheria, who had died the year before. It was in consequence of the quarrels among the Randherias themselves in connection with the election or appointment of this man, that the present suit was launched in the Chief Court of Lower Burmah. The original defendants to the action were four persons who were actually managing the mosque as trustees, but the validity of whose appointment as such was impugned by the plaintiffs. In addition three others were joined as defendants ostensibly to represent the Randheria section, but in reality, as the trustee defendants charge, to represent the plaintiffs' faction.

On the institution of the suit notices were issued by the Court under section 30 of the Civil Procedure Code to all persons entitled to worship at the mosque. Thereupon defendants 12 and 13, representing the

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general body of Sunni worshippers, and defendants 8 to 11 claiming to represent the Surati community, and 14 to 17 the other Randherias appeared and applied to be joined as parties. Each set of defendants has filed a separate defence. Although the trustee defendants deny the plaintiffs' allegation that the mosque in question is a Randheria mosque, and affirm the validity of their and Hashim Yacub Ally's appointment as trustees, they associate themselves with the plaintiffs and their Randheria co-defendants in claiming that the right of management of the mosque belongs exclusively to their party. And they ask that the scheme, if any is to be framed, should be framed on that basis.

The defendants 12 and 13, who represent the general body of worshippers, controvert in substance the right of the Randherias to a monopoly of the management as opposed to the whole nature of the trust; and they claim that as the mosque is dedicated to the performance of public worship by all Mahomedans of the Sunni persuasion, now that a scheme is proposed to be settled under the direction of the Court they should be allowed a voice in its administration.

The suit proceeded to trial before Mr. Justice Robinson, and the whole dispute centred round two points, viz.:—

- (i) The effect of the trust deed of 1872, and
- (ii) Whether the Randherias should or should not have the sole and exclusive charge and management of the mosque.

The Randherias rested their case on the trust deed of 1872; they contended that it created a new trust and that the founders, namely, the five persons in whose names the land had been purchased from the Government, were entitled to provide that the

management should remain exclusively in the hands of their own section of the community. The learned trial Judge states their contentions in the following terms:—

"It is urged that the original mosque was created by a Randheria; that the original grant was revoked and the lands sold outright to Randherias, that they thus became the creators of the trust and were 'at liberty to make any lawful condition they pleased as to the management of the trust.'"

And his decision is expressed in these words:—

"The position in 1871, then, was that the five vendees, became the absolute and untrammeled owners of these two plots and could do with them as they pleased. . . . They became the owners of the mosque, shops, and lands, and created a trust of them. It was undoubtedly open to them to manage the trust themselves or to lay down the manner in which it was to be managed, and this they did in Exhibit C."

He accordingly came to the conclusion that the Randheria party were exclusively entitled to the management of the mosque.

On appeal by the respondents in the first and second appeals respectively, the learned Judges of the Chief Court, differing from the Trial Judge, held in substance that the lands which were purchased by or in the names of the five persons in 1871 were acquired by them as trustees for the purposes of the existing mosque and subject to the trust therefor; and that nothing that took place in 1871 or 1872 had the effect of cancelling, or could in law cancel, the original trust; and that as the original trust was for the benefit of all persons "professing the Sunni sect of the Mahomedan religion," they thought that "all Sunni Mahomedans were entitled to a voice and control of the Juma Musjid of Rangoon."

The plaintiffs and trustees defendants have appealed to His Maj. Council, and the same contention was put in the Courts below. based on me been urged on

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their behalf. It has further been contended that under the Mahomedan law the Court has no discretion in the matter and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or *mutawallees*. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in the case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interest of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interest of the institution.

Illustrations of this rule are to be found in almost every work on Mussalman law. And the authorities lay down that, "were the *wakif* (the founder) to make a condition that the King or Kazi should not interfere in the management of the *wakf*, still the

Kazi will have his superintendence over it, for his supervision is above everything."

Their Lordships agree with the Chief Court that the transactions which took place in 1871 and 1872 in no way affected the existing trust, and that the trust deed of 1872 did not create a new dedication; the mosque remained as heretofore a public mosque, dedicated to the performance of worship by all Sunni Mahomedans as originally founded.

In their Lordships' opinion, the real point in issue in the case, owing probably to the nature of the pleadings, has to some extent been missed by the Courts in India. It has been treated as a question involving the determination of conflicting rights rather than a consideration of the best method for fully and effectively carrying out the purposes for which the trust was created. The suit is brought under section 539 of the Code, which vests a very wide discretion in the Court. It declares (omitting the parts not material to this case) that—

"whenever the direction of the Court is deemed necessary for the administration of any express or constructive trust created for public, charitable, or religious purposes, the Advocate-General, acting *ex officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court, or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

"(a) Appointing new trustees under the trust ;

"(e) Settling a scheme for its management ;

"or granting such further or other relief as the nature of the case may require."

In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the

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institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future.

In the present case, Moolla Hashim, although he was assisted by several of his compatriots in acquiring the land on which the bamboo mosque was built, was to all intents and purposes its original founder; in 1857, when the bamboo structure was burned down, he replaced it with a plank building; he and his Randheria fellow townsmen held the *mutwalieeship* until 1871. Since that date also the management has been carried on by people belonging to Randher. In 1862, the lands were purchased with money supplied by them; and in 1871 the bulk of the money appears to have come from the same source. It is not alleged that they have mismanaged the trust or committed any dereliction of duty, or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers. In these circumstances it seems to their Lordships, in the exercise of the discretion which the Mussulman law vests in the *Kazi*, that the Randheria section of the worshippers, all other conditions being equal, are preferably entitled to the *mutwalieeship* of the mosque. With regard to the case of *Ibrahim Esmael v. Abdool Carrim Peermamode* (1), which has been relied upon on behalf of the respondents, their Lordships deem it sufficient to say that the facts to which they have referred differentiate it widely from the present case.

The present case, however, in their Lordships' opinion, illustrates the mischief of leaving the power

(1) [1908] A.C. 526; L.R. 35 I.A. 151.

of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, whether they call themselves *Punchayet* or *Jamael*. In order to avoid, so far as possible, a recurrence of the trouble that has brought about this long-drawn litigation, their Lordships think it desirable, in the interests of the institution which form the primary matter for consideration, that the appointment of future trustees should be entrusted to a committee of the worshippers the composition of which should be in the discretion of the Judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Judge should lay down rules for their guidance in the discharge of any supervisory functions that it may appear necessary to confide to them and for filling up vacancies on their body subject to his control.

Their Lordships are accordingly of opinion that the orders of the Courts of India should be discharged and that the case should be remitted with the following declaration and directions to the Chief Court of Lower Burma to deal finally with the matter: That all other conditions being equal, the Randheria section of the worshippers are preferably entitled to manage and act as trustees of the Sunni Juma Musjid of Rangoon; that the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which committee should be in the discretion of the Court, with due regard to local needs and conditions, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any

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supervisitorial functions that it may appear necessary to confide to them, and for filling up vacancies on their body subject to its control.

As regards the costs in the Courts below, the trustee-defendants will have their costs out of the funds of the institution; the rest of the parties will bear their own costs.

The parties will bear their own costs of these appeals.

And their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the appellants: *Bramall & White.*

Solicitors for the respondents: *Arnould & Son
J. V. W.*

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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Remand—Remand of case on issue only raised on second appeal—Case decided by lower Courts on issues of fact—Civil Procedure Code 1882, s. 584—Absence of ground of law to support second appeal—Costs—Suit to eject a pahar in service of zamindar holding under kabuliat with Government—Onus of proving land as choklidari chakran—Right to dismiss pahar.

The plaintiff, a zamindar under a kabuliat with the Government made by his predecessor in title in 1801, sued to eject from a jaghir within his zamindari pahar in his service whom he had dismissed from his service with notice to quit. The Secretary of State for India, now sole respondent, was

^a Present: LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE AND MR. AMFEE ALL.

also made a defendant, as the Government disputed the zamindar's right to dismiss the paik. The plaintiff's case was that there were two classes of paiks, the Government paiks who performed police duties and who could be dismissed only by the Government, and that class alone came within the terms of the kabuliat, and private paiks who performed services personal to the zamindar, and that the paik in suit belonged to the latter class and the zamindar was therefore entitled to dismiss him. Both the Subordinate Judge and the District Court held that the paik defendant did not come within the terms of the kabuliat, and found concurrently on the facts in favour of the plaintiff's contentions, but the District Judge gave no specific reasons for his decision. The High Court admitted a second appeal by the respondent on an issue not previously raised in the case, "whether the land in suit had been excluded from assessment at the settlement in 1792 as being appropriated for the maintenance of paiks performing police duties, and whilst agreeing with the lower Courts on the construction of the kabuliat, ignored the findings of fact, and remanded the appeal for the trial of the fresh issue, making the plaintiff, who had succeeded, pay all the costs then incurred.

Held that the High Court in second appeal was by section 384 of the Code of Civil Procedure, 1882, then in force, bound by the findings of fact of the District Judge who "had considered the evidence and saw no reason for differing from the findings of the Subordinate Judge." The High Court could therefore only allow the appeal on a ground of law, and on the only question of that Court agreed with the Courts below. Even if it were competent to the High Court to remit a case for rehearing on an issue not raised in the pleadings or even suggested in the Courts below, it ought only to be done in an exceptional case for good cause shown, and on payment by the party appealing of all costs. The respondent did not suggest he was taken by surprise or had discovered fresh evidence of which he was previously unaware. The omission to raise the issue early in the case appeared to be deliberate, the onus of proving it was on the respondent, and there was little, if any, evidence to support it. The appeal was consequently allowed.

APPEAL No. 37 of 1914 from a judgment and decree (27th April 1910) of the High Court at Calcutta which reversed, on second appeal, a decree (10th July 1907) of the District Judge of Midnapore which had confirmed a decree (21st January 1907) of the Subordinate Judge of Midnapore, and remanded the appeal for re-trial.

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The plaintiff was the appellant to His Majesty in Council.

The questions for determination on this appeal were as to whether the appellant's title to certain jaghir lands and his right to dismiss the jaghirdar from his office of paik had been established; and whether an order of the High Court remanding the case for re-trial was justified.

The circumstances under which the above questions arose were as follows:—

The appellant was a zamindar and proprietor of pargana Nayabasan and some of the lands in his zamindari were held by persons called paiks on chakran or service tenure. A predecessor in title of the appellant had in 1801 executed a kabuliat in accordance with Bengal Regulation I of 1793, which contained, *inter alia*, a clause to the following effect:—

"I shall maintain and keep on the same sardars and paiks who have all along existed in the said pargana. I shall carry out whatever order may be passed by the Magistrate on the paiks. I have no power to dismiss the sardars and paiks. I shall year by year file a list of the names of the individual sardars and paiks before the Magistrate, and one such list before the Collector. I shall depute the paiks to keep watch and take care of the boundaries of the said pargana, and see that no theft and dacoity and riot may take place anywhere. I shall constantly be engaged for the good of the Government. I shall carry out any order that may be passed by Government as best I can. I shall not neglect in any way to pay the Government revenue, and to comply with the several provisions"

On 13th December 1898 the appellant through his manager gave notice of dismissal for alleged misconduct to one Suba Naik who was in his service as a paik, and called upon him to give up possession of a jaghir of about 26 bighas which he held as remuneration for such services, and hand the lands over to one Nanda Ram who was appointed to succeed him. Suba Naik on 9th March 1899 petitioned the District Magistrate of Midnapore, who referred the matter to the

police, and on their reporting that Suba Naik was a servant of the appellant and not under orders of the Government, the Magistrate declined to interfere. On a petition in June 1899 for a review of his order the Magistrate, however, after enquiry passed an order in December 1899 reinstating Suba Naik in his office of paik and directing the appellant to restore to him possession of the jaghir lands. From that order the appellant unsuccessfully appealed both to the Commissioner of the Division and to the Government of Bengal; and Suba Naik remained in possession of the office of paik and the jaghir lands appertaining thereto until his death on 12th May 1901, and was succeeded by his sons the respondents Kirtibash Naik and Pirthi Nath Naik.

'On 16th January 1906 the appellant instituted the suit out of which this appeal arose, making the sons of Suba Naik and the Secretary of State for India in Council defendants and claiming possession of the jaghir, and a declaration of his title and of his right to appoint such holders of service-lands as were Suba Naik and his sons without the interference or control of Government.

The appellant's case was that there had been from time immemorial within his zamindari two classes of paiks who held jaghir lands as remuneration for their services, namely, one class who performed police and other public duties and were called chowkidars, digais and sardars, the appointment and dismissal of whom was in the hands of the officers of Government, and another class who performed only private duties for the appellant, and were called dal paiks or paiks, whose appointment and dismissal rested with the appellant; that Suba Naik belonged to the latter class, and had been properly dismissed by the appellant from his post, and ordered to give up the

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he held; that the order of the District Magistrate reinstating him was *ultra vires* and illegal; and that the possession of the jaghir lands thereafter by Suba Naik and his sons had been wrongful, and he prayed for a decree as above with mesne profits and costs.

The second and third respondents in a written statement admitted that they and their father were dal paiks, and that the appellant had the right to dismiss them, but claimed that they had nothing for which they could be dismissed.

The first respondent, the Secretary of State, in his written statement relied on the kabuliat, and disputed the appellant's classification of paiks, contending that all paiks and sardars on the estate came within the kabuliat, and that in any view of the matter Suba Naik came within the first of two classes. He also alleged that Suba Naik was not a servant of the zamindar; that his uncle Baiju was the paik before him and held the "paikan land"; and he did not admit the appellant's title to the jaghir land in suit.

The Subordinate Judge held that there was nothing in the kabuliat to prevent the zamindar from keeping private paiks, and that the existence of such paiks in the service of the zamindar was admitted by Government in a rubokuri as early as 1831; and he came to the conclusion on consideration of all the evidence that there was a class of private paiks over whom the zamindar had absolute control, and that Suba Naik had belonged to that class.

On appeal by the Secretary of State, the District Judge confirmed the decree of the Subordinate Judge. He held that for many years no holders of service tenures, except chowkidars and digars, had done any police duties beyond those incumbent on all zamindars and their servants; that from 1810 and onwards there had been a distinction between paiks known as

chowkidars and digars who came within the provisions of the kabuliat, and the second class of paiks known as dal paiks, dal sardars, etc., who did not; and that Suba Naik was one of the latter class.

The Secretary of State preferred a second appeal to the High Court, in the grounds of which he raised for the first time in the case the following contentions: (a) that the material issue in the case was whether the lands in suit were at the settlement in 1801 dealt with as ordinary lands of the estate or as jaghir lands reserved for remunerating paiks for services; (b) that important questions in the case were, whether the jaghir tenure of Suba Naik was in existence at the date of the said settlement; and what was the nature of the duties which Suba Naik had to perform at the date of that settlement; and that this issue and these questions had not been tried.

The appeal was heard by BRETT and SHARFUDDIN JJ. who set aside the decree of the District Judge and remanded the case to him to try certain material issues which they held had been left undecided, and to deal with the case in accordance with directions given in their judgment.

The High Court held that the question of title as to whether the jaghir land in dispute had been appropriated at the time of the Decennial Settlement in 1801 for that purpose and had been excepted from assessment of Government revenue was left undecided; that between 1853 and 1858 Baiju Naik had been a paik under the orders of the police, and that he had been in possession of 13 bighas odd of land as jaghir, and that the conclusion of the lower Courts that because Suba Naik was in possession of 26 bighas he could not therefore have been in possession of Baiju Naik's 13 bighas was not justified; that the District Judge had given no reason for his finding that Suba

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Naik came within a class of paiks called dal paiks, and was outside the provisions of the kabuliat; that it was necessary for the proper determination of the suit that it should be decided (*a*) whether the lands held by Suba Naik were included in the lands covered by the kabuliat; (*b*) that a proper finding with reasons should be come to on the question as to whether Suba Naik was exclusively employed on zamindari work and performed no police duties; and (*c*) if the jaghir lands held by Suba Naik or any part of them had been appropriated for the maintenance of paiks doing police duties at the settlement, whether the fact that Suba Naik had not been actually employed on police duties could entitle the plaintiff to withdraw them from the operation of the provisions in the kabuliat, to take khas possession of them and to discharge or appoint a holder of such lands at his option.

On this appeal,

De Gruyther, K. C., and *E. B. Raikes*, for the appellant, contended that by virtue of Bengal Regulation I of 1793 the appellant had an absolute proprietary interest in all lands within the ambit of his zamindari, and that the onus was on the respondent to prove that any lands were excepted: see *Secretary of State for India v. Kirtibas Bhupati-Harichandan Mahapatra* (1). There was no allegation or proof in the lower Courts that the lands in suit were chowkidari chakran lands. Nowhere in the written statement of the respondent was it asserted that any portion of the land was subject to the clause set out from the kabuliat of 1801, or that any part of such land was held by Suba Naik. The nature of the lands was properly ascertained by the nature of the services rendered by

(1) (1914) I. L. R. 42 Calc. 710, 722, 727; L. R. 42 I. A. 30, 35.

the holders. The case of the appellant was that there were two classes of paiks, the Government paiks performing police duties who were liable to be dismissed only by the Government (see Regulation XVII of 1793), and the paiks who were private servants of the zamindar; and that Suba Naik was a private paik, and consequently the appellant was entitled to dismiss him. Both the lower Courts had held on the facts in accordance with the appellant's contention, and the High Court had no power on the second appeal preferred by the respondent to interfere with the facts so found. By section 584 of the Code of Civil Procedure, 1882, a second appeal only lay on a question of law: see *Durga Chowdhurani v. Jewahir Singh Chowdhri* (1), and no substantial alteration had been made by the corresponding sections (100 and 101) of the Civil Procedure Code, 1908, in that respect. On second appeal, the respondent raised for the first time questions for the decision of which the High Court, it was submitted, had wrongly remanded the case. That order ought to be set aside.

Sir Erle Richards, K. C., and A. M. Dunne, for the respondent, contended that the appellant's title to the lands and his right to dismiss Suba Naik had not been established. The appellant claimed a declaration of his title to the land: the respondent admits that the land is within the ambit of the zamindari, but says that it was excluded from assessment as being assigned for the maintenance of the police force. Some of the paiks do both public duties as police, and also private services: reference was made to *Joykissen Mookerjee v. Collector of East Burdwan* (2). The cases of this class where the service is public as well as private depended on the question what was

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(1) (1890) I. L. R. 18 Calc. 23, 30; (2) (1864) 10 Moo I. A. 16, 38, 45.
L. R. 17 I. A. 122, 127.

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the character of the land at the time of the decennial settlement. A wrong construction was put on the kabuliit, and the findings of the lower Courts did not determine the main issues arising in the case. The respondent was therefore entitled to question the decision of the District Judge : the misconstruction of a document was a question of law on which a second appeal would lie: *Fateh Chand v. Kishen Kunwar*(1). No doubt the question was only raised for the first time in the grounds of appeal to the High Court, but it is one that ought to be determined in the suit, namely, whether the land was assessed in the settlement of 1792. The order of the High Court was therefore right.

The appellant was not called upon to reply.

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The judgment of their Lordships was delivered by LORD PARKER. This was an action in which the appellant, as plaintiff, sought to recover possession from the first and second defendants of a jaghir containing about 26 bighas of land situate within the territorial limits of the parganah Nayabasan in the district of Midnapore, of which the appellant was the proprietor. The Secretary of State, who alone has appeared as a respondent in this appeal and is hereafter referred to as the respondent, was added as a third defendant, because the Government of India disputed the right which the appellant was asserting in the action. The appellant's case was that in 1898 one Suba Naik was in his personal service and held the jaghir on service tenure determinable when his employment ceased; that he had duly determined the employment of Suba Naik and given him notice to quit his jaghir; that Suba Naik had refused to deliver up

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On reference to the written statement of the respondent by way of defence to the action, it will be found that, so far as material for the purposes of the present appeal, he relied entirely on the provisions of the kabuliat. In order to succeed he had, therefore, to prove that Suba Naik held by service tenure involving the performance of police duties. Curiously enough, the first two defendants put in a statement, by way of defence, repudiating this. Their case was that they were in possession by hereditary right on a service tenure which did not involve the performance of any police duty, but that the appellant had no right to dismiss them if they were ready and willing, as they in fact were, to perform their proper services. They subsequently applied for leave to withdraw this statement and substitute another. This application was refused, but they appear to have given evidence at the trial in support of the respondent's case.

The Subordinate Judge found first that there had always been two classes of paiks within the parganah: (i) paiks who hold their jaghirs in consideration of the performance of police duties, and (ii) paiks whose tenure service were personal to the zamindar. He also found that Suba Naik belonged to the latter class. On these findings of fact he held, and in their Lordships' opinion rightly held, that the defence of the respondent failed, and gave judgment in favour of the appellant.

The first and second defendants were content with this decision, but the respondent appealed to the District Judge, who came to the same conclusions both of fact and law as had been come to by the Subordinate Judge, and dismissed the appeal with costs.

The respondent thereupon presented an appeal to the High Court. By section 581 of the Civil Procedure Code then in force the High Court as second

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Court of Appeal was bound by the findings of fact of the District Judge. In their Lordships' opinion the High Court was not at liberty to disregard the finding that Suba Naik belonged to the class of paiks having no police duties, on the ground that the District Judge gave no reasons for coming to this finding. The reasons of the District Judge are clear. He had considered the evidence, and saw no reason for differing from the conclusions at which the Subordinate Judge had arrived. The High Court therefore could only allow the appeal on grounds of law, and as they agreed with the Court below on the construction of the kabuliat, it is not obvious what other questions of law arose. The respondent, however, urged upon the High Court that the Courts below had entirely misconceived the issue they had to try. This issue was, he contended, whether the lands comprised in the jaghir in question were chowkidari chakran lands, that is, lands—which at or before the settlement had been appropriated or assigned for the maintenance of the police force, and by reason of such appropriation excluded from the zamindari assessment. It is in their Lordships' opinion quite clear that no such issue was raised by the pleadings. Had this been the issue raised by the pleadings, the question whether Suba Naik was a paik with police duties would have been of little importance if not quite immaterial. The appellant would be precluded by Regulations I of 1793 and XIII of 1805 from utilising chowkidari chakran lands for remunerating persons who were his personal servants and performed no police duties; but as appears from the case of *The Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra* (1), the onus of proving that the lands in question were so appropriated or assinged would lie on

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the respondent. The kabuliat contains no reference whatever to any such lands.

It was admitted before their Lordships that this contention was put forward for the first time before the High Court. Such admission could hardly be avoided. The real question upon the pleadings was whether the appellant could rightly terminate Suba Naik's tenancy. The new issue suggested raises the question not whether Suba Naik's tenancy could be determined, but whether it ought not to be determined and the jagir utilised for maintaining some police officer appointed by the Government. Nevertheless the High Court held that this was the real issue, and, as it had not been tried, discharged the order of the District Judge and remitted the action for rehearing. It not only did this, but it ordered all the costs already incurred to abide the result of the rehearing. In other words, if the appellant failed on a new case set up for the first time on the second appeal, he would have to pay the whole costs of the issues on which he had succeeded in the two Courts below.

In their Lordship's opinion, even if it be competent to the High Court to remit a case for rehearing on an issue not raised in the pleadings or even suggested in the Courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away. In the present case the respondent showed no ground whatever for the indulgence he claimed. He did not suggest that he had been in any way taken by surprise or had discovered fresh facts of which he was unaware when the case was before the lower Courts. The possibility of the lands in question being chowkidari chakran lands, which could not, according to the regulations, be resumed, must have been present to

the minds of his advisers when his statement by way of defence was filed. It had been suggested by the Magistrate, whose order necessitated the action. The action of the respondent's advisers in not raising the point must have been deliberate. With knowledge of it he elected to fight the action on the question whether Suba Naik could rightfully be dispossessed of his jaghir, rather than on the question whether he ought not to be dispossessed and the jaghir utilised for police purposes. The record contains little or no evidence pointing to there being any chowkidari chakran lands which could not be resumed within the parganah. On the contrary, the *Rubakari* in Persian, the genuineness of which was accepted by the District Judge, points the other way. The respondent does not suggest that he has any further evidence.

Their Lordships are therefore of opinion that this appeal should be allowed with costs here and below, and that the order of the District Judge should be restored, and they will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the appellant : *T. L. Wilson & Co.*

Solicitor for the respondent : *Solicitor, India Office.*

J. V. W.

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APPELLATE CIVIL.

Before N. R. Chatterjee and Richardson JJ.

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Feb. 28.

v.

PROBHAT CHANDRA SEN.*

Hindu Law—Partition—Right to partition—Partition between co-owners—Reversionary interest—Administrator's power to transfer property—Permanent leases—Prolate and Administration Act (V of 1881) s. 80

Where plaintiffs in a suit for partition were in joint possession of certain property with the defendants as co-sharers under leases which purported to be permanent leases granted to them under an arrangement sanctioned by the Court, and where the only person at the time of the suit interested in challenging the plaintiff's right was a party to the suit and did not contest the suit :—

Held, that the plaintiffs were entitled to partition and the fact that the partition would have to be set aside if the reversioner on coming into possession of the property succeeded in a suit for setting aside the leases, was not sufficient ground for refusing the plaintiffs the right to partition.

Sunilar v. Parbati (1) and *Bhagirat Sahai v. Bipin Behari Mitter* (2) followed.

SECOND APPEAL by Nawab Sir Salimullah Bahadur and others, the plaintiffs.

One Madhu Sudan Das died possessed of certain properties and leaving him surviving his widow, Shyam Peari, and four sons, Mohini Mohan, Radhika Mohan, Lal Mohan and Khettra Mohan. Subsequently, the interest of Khettra Mohan in the estate of his

* Appeals from appellate decrees, Nos. 1493, 1656 and 1657 of 1913 against the decree of F. W. Ward, District Judge of Tippurah, dated Feb. 6, 1913, affirming the decree of Srikauri Haldar, Subordinate Judge of Tippurah, dated Feb. 26, 1912.

(1) (1889) I. L. R. 12 All. 51; (2) (1910) I. L. R. 37 Calc. 918;
I. R. 16 I. A. 196. I. R. 37 I. A. 198.

deceased father devolved on Mohini Mohan and that of Radhika Mohan and of Lal Mohan on their widows, Gobinda Rani and Priya Moicee, respectively. On the 27th September, 1890, Mohini Mohan executed a mortgage in favour of the Eastern Mortgage and Agency Co., Ltd., for the sum of Rs. 250,000 and in pursuance of the conditions therein contained he also executed a power of attorney, whereby he conferred on Messrs. Garth and Weatherall the entire management of the mortgaged property and undertook not to interfere with the same in any way. On the 28th December, 1896, Mohini Mohan died and his estate devolved on his mother Shyam Peari. On the 29th January, 1897, one Soshi Bhusan Guha obtained letters of administration to Mohini Mohan's estate. In consequence of certain difficulties having arisen in the proper management of the estate of the deceased mortgagor, a deed was executed on the 3rd April, 1897, between Soshi Bhusan Guha as administrator, the said company as mortgagee and Messrs. Garth and Weatherall, whereby the mortgaged properties were transferred to the latter as *annukhtears*, managers and trustees with powers to manage the said properties and to grant perpetual leases. On the 1st May, 1897, sanction of the District Judge of Dacca was obtained to this deed of trust by Soshi Bhusan Guha as required by section 90 of the Probate and Administration Act. Under a separate indenture Priya Moicee also executed an usufructuary mortgage for a term of years in respect of her share in her deceased husband's estate as well as a trust deed with similar powers in favour of Messrs. Garth and Weatherall. Some time after executing these deeds Priya Moicee died and her interest in the estate was inherited by Shyam Peari, who thus became interested in the shares of Mohini Mohan, Lal Mohan and Khettra Mohan, while the interest of

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Radbika Mohan still remained in Gobinda Rani, who was living at the time of the present suit. Under the powers conferred on the trustees, two *dar-sikmi* tenures and a *patni taluk* in respect of certain shares in Shyam Peari's and Priya Mojee's properties were granted to the plaintiffs by the trustees in 1903 and thereafter the plaintiffs continued in joint possession with the other co-owners, none of whom ever objected to the joint possession. Within a year of the grant of letters of administration to Soshi Bhusan Guha the administration ceased. On the 1st September, 1910, the plaintiffs filed three suits for partition against all the co-owners. Two of these suits were in respect of the *dar-sikmi* tenures and one in respect of the *patni taluk*. The plaintiffs alleged that owing to the disagreement amongst the co-owners, the plaintiffs always had difficulties in connection with the collection of rents and as the defendants were unwilling to agree to an amicable partition, these suits were brought. Some of the defendants contested the plaintiffs' claim. Both the Courts below dismissed these suits dealing with them jointly. The plaintiffs, thereupon, appealed to the High Court.

Mr. B. Chakravarti, with him *Babu Surendra Nath Guha*, for the appellants. Under section 90 of the Probate and Administration Act the administrator, in whom the entire property vested for all purposes, had full powers to alienate the property or any portion of it and to create trusts, provided the previous sanction of the Court was obtained. The words of that section were quite general. This sanction was obtained. The permanent leases granted by the trustees, Messrs. Garth and Weatherall, to the plaintiffs in respect of these properties were not void, but voidable. They had complete authority to enter into the

leases which were executed in the course of their management. As regards the leases of the properties belonging to the share of the widow Priya Moice, they were on the same footing also, that is to say, they were not void, but voidable. The only persons entitled to avoid them was not any of the contesting defendants, who had no immediate interest in the property, but Syam Peari who was made a party to the suit and did not oppose it. The plaintiffs being in joint possession with the defendants were, therefore, entitled to partition. The cases of *Bhagwat Sahai v. Bipin Behari Mitter* (1), *Shubhadra Dassya v. Chandra Kumar Nag* (2), *The Eastern Mortgage and Agency Co., Ltd. v. Rebati Kumar Ray* (3) and *Sundar v. Parbati* (4) were relied on.

Babu Jogesh Chandra Ray (with him *Babu Jatindra Nath Bose* and *Babu Kshitish Chandra Neogi*), for the respondents. Messrs. Garth and Weatherall were not entitled to confer any title on the lessees. The trustees' powers were conferred on them by the administrator who had no right to delegate his authority. The sanction required in section 90 of the Probate and Administration Act must be sanction in each case. General sanction would not do. It was necessary to obtain particular sanction in each case. In order to maintain a suit for partition, the plaintiffs must prove that they had both title to and possession of the properties to be partitioned. In the present suit the leases were not granted by the administrator. In fact administration had ceased long before the leases were granted and the powers of the trustees had consequently terminated. The cases of permanent leases granted by the administrator himself had

(1) (1910) I. L. R. 37 Calc. 918; (3) (1906) 3 C. L. J. 260.

L. R. 37 I. A. 198.

(4) (1909) I. L. R. 12 All. 51;

(2) (1903) 8 Q. W. H. 51.

L. R. 16 I. A. 186.

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SALIMULLAH no application to this suit. The plaintiffs had merely a limited interest in the properties.

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A person entitled to a limited interest cannot be said in all cases to be entitled to partition : see *Hemadri Nath v. Rammani Kanta Roy* (1). In each case it must be shown that a co-owner was entitled to partition as a matter of right before partition would be allowed. The case of *Sundar v. Parbati* (2) was one between two co-widows claiming under the same title and had no application to the present suit. Even two co-widows were not entitled to enforce an absolute partition. The cases of *Gajapathi Nilamani v. Gajapathi Radhamani* (3), *Jijoyiamba Bayi Saiba v. Kamakshi Bai-Saiba* (4) were relied on. A Hindu widow was not entitled to alienate the estate inherited from her husband where such alienation might prejudice any reversionary heirs : see *Bhugwandeep Doobey v. Myna Bai* (5). Having regard to all the circumstances this was not a case in which partition should be granted.

Mr. B. Chakravarti, in reply, referred to the case of *Bhagwat Sahai v. Bipin Behari Mitter* (6).

N. R. CHATTERJEA AND RICHARDSON JJ. These appeals arise out of suits for partition, and the Courts below have dismissed the suits upon a preliminary point, namely, that the plaintiffs had not acquired any such interest in the properties as to entitle them to maintain a suit for partition.

It appears that one Madhu Sudan Das left four sons, Mohini Mohan Das, Radhika Mohan Das, Lal

(1) (1897) I. L. R. 24 Calc. 575, 580. (4) (1868) 3 Mad. H. C. 424.

(2) (1889) I. L. R. 12 All. 51; (5) (1867) 11 Moo. I. A. 487.
 L. R. 16 I. A. 186.

(3) (1877) I. L. R. 1 Mad. 290; (6) (1910) I. L. R. 37 Calc. 918.
 L. R. 4 I. A. 212.

Molian Das and Khettra Mohan Das. Khettra Mohan's interest devolved upon Mohini Mohan. Radhika Mohan's interest devolved upon his widow Gobinda Rani and Lal Mohan's interest was inherited by his widow Priya Moiee. Mohini Mohan Das obtained a loan of Rs. 2,50,000 from the Eastern Mortgage and Agency Company under a deed of mortgage dated the 27th September, 1890. One of the conditions upon which and subject to which the said company agreed to grant the said loan was that the mortgaged properties should be managed entirely and without any interference from the said mortgagor by Mr. Garth and Mr. Weatherall, and Mohini Mohan executed a power of attorney in their favour. Mohini Mohan died on the 28th December, 1896, and Letters of Administration of his estate were granted to one Soshi Bhusan Guha on the 29th January, 1897. The mortgagees, it appears, subsequently found that there were difficulties in the way of management of the estate and in the conduct of law suits which could be avoided if the properties were vested in trustees. An indenture transferring the mortgaged properties to Messrs. Garth and Weatherall as trustees with powers to manage them, which included the power to grant perpetual leases, was accordingly drawn up and submitted by the administrator to the District Judge of Dacca who sanctioned it on the 1st May, 1897. On the 31st April, 1897, the indenture was executed between the administrator Soshi Bhusan Guha representing the estate of the mortgagor Mohini Mohan Das, the Eastern Mortgage and Agency Company the mortgagees, and Messrs. Garth and Weatherall the trustees transferring the properties to the latter as *am-mukhtars*, managers and trustees. Priya Moiee executed an usufructuary mortgage in respect of her share in favour of the said Messrs. Garth and Weatherall for a term of years and

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also a trust deed with similar powers. These trustees granted certain permanent leases, *dar-sikmi* tenures in two of the cases, and a *patni taluk* in the third, in favour of the plaintiffs in 1903 in respect of certain shares in some properties and the plaintiffs remained in joint possession of those shares with the other co-owners since 1903 : and in September, 1910, the plaintiffs brought these suits for partition against those other co-sharers.

It may be mentioned here that on the death of Mobini Mohan and Priya Moiee, their estate devolved upon Shyam Peari. The Court of appeal below held that section 90 of the Probate and Administration Act does not empower an administrator appointed under the Act to delegate his powers to others ; that even if the trust deed was valid, Soshi Bhusan being dead his administration ceased many years ago, and the "sub-trustees" could not grant leases after their own trusteeship ceased ; and that in any case they had no right to grant permanent leases it being nowhere provided that their possession was to be permanent. As regards Priya Moiee, the Court below observes that it was not the case of the plaintiffs that she executed the leases for legal necessity, and she having died, any permanent leases granted in respect of her share by the said trustees are voidable.

That Court accordingly held that the leases set up by the plaintiffs were voidable and that "it is clearly then undesirable that a partition should be effected until it is definite that such leases are not so voidable."

It is unnecessary to consider in the present cases whether the leases obtained by the plaintiffs from Messrs. Garth and Weatherall are valid or voidable at the instance of the reversioner after the death of Shyam Peari. The plaintiffs are in joint possession of

the shares with the defendants as co-sharers, under leases which purport to be permanent leases, granted to them under an arrangement sanctioned by the Court. The only person at present interested in challenging their right is Shyam Peari who is a party to the suit and she does not contest the suit. The contending defendants have no interest whatever either present or future in the shares in respect of which the plaintiffs claim to be lessees, and the plaintiffs have been in possession jointly with them ever since 1903 without any objection on the part of the defendants. In fact in some rent suits these defendants made the present plaintiffs parties-defendants as co-sharer landlords. We think that under the circumstances the principle laid down in the case of *Sundar v. Parbati*(1) applies. In that case two Hindu widows were in lawful possession of properties of their deceased husband and one of them brought a suit for partition against the other. There was a question in that case whether there had been a valid adoption made by the deceased husband and whether the estate had been given to the said adopted son by a will of the deceased. The Judicial Committee held that apart from those questions, the fact of joint possession by the two widows of the estate which belonged to the testator ever since the death of the adopted son appeared to them sufficient for disposing of the suit in favour of the plaintiff. Referring to the possession of the widows, their Lordships observe.—“Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Prem sukh

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(the adopted son) or of Baldeo Sahai (the deceased husband) one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstances that they may have ascribed their possession to one or more other titles which do not belong to them."

The same consideration applies to this case. It is contended on behalf of the respondents that the Court ought to take into consideration the fact that on the death of Shyam Peari, the reversioner may bring a suit for setting aside these alienations, and that if he succeeds in doing so, the partition would have to be set aside. That we think is not a sufficient ground for refusing the plaintiffs the right to partition which they have at present in respect of their possession. In the case of *Bhugnat Sahai v. Bipin Behari Mitter* (1), it was held by this Court that the *mokarstridars* (the plaintiffs in that case for partition) had not such a permanent interest as to ensure that any partition then effected would be of enduring effect, on the ground that the *mokarstridars* in that case might incur forfeiture in certain contingencies mentioned in the lease. Their Lordships in overruling the decision observed as follows:—

"But those learned Judges held that the right of partition, which would otherwise have belonged to the appellants, the *mokarstridars*, was lost by reason of the fact that their *mokarstri* is liable to forfeiture in certain contingencies and therefore is lacking in the permanence of interest necessary to support a claim for partition. Their Lordships are of opinion

that the distinction thus introduced cannot be supported.

"The title of the appellants is a permanent title, though liable to forfeiture in events which have not occurred and the rights incidental to that title must in their Lordships' opinion be those which attach to it as it exists without reference to what might be lost in future under changed circumstances."

Having regard to the circumstances already stated and to the fact that the only person who is now interested in challenging the title of the plaintiffs has not contested the suit at all, we think the Courts below are wrong in dismissing the suit upon the preliminary ground mentioned above.

The decrees of the Courts below are accordingly set aside and the cases sent back to the Court of first instance in order that they may be tried on the merits.

Costs of these appeals will abide the result.

O. M. *Appeal allowed; case remanded.*

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CRIMINAL REFERENCE.

Before Chitty and Wulmsley J.J.

1916

March 21.

EMPEROR

v.

SHEIKH ABDUL.*

Security for good behaviour—Previous convictions, proof of—Central Bureau register of thumb impressions, evidentiary value of—Extract from jail register without proof of identity—Locus penitentiae—Criminal Procedure Code (Act V of 1898), s. 110.

* Whenever proof of previous convictions is required, whether under section 75 of the Penal Code or Chapter VIII of the Criminal Procedure Code, such previous convictions must be proved strictly and in accordance with law, and unless so proved no Court can take them into consideration.

A register produced from the Central Bureau purporting to contain the thumb impression of the accused and his descriptive roll with a list of his previous convictions, when there was no evidence how it came to be made and lodged in the Central Bureau nor from what particulars the previous convictions were recorded and certified, was held insufficient proof of such convictions.

An extract from the jail register showing previous convictions of a certain person with *aliases* and certified copies of previous convictions of the same in the absence of evidence of identity with the present accused, held insufficient to prove previous convictions of the latter.

A person who has served the period of his imprisonment should be given a chance of reformation and should not be proceeded with under section 110 of the Criminal Procedure Code soon after his emergence from jail.

Junab Ali v. Emperor (1) referred to.

Although general statements of witnesses, e.g., that the accused are all pickpockets and that every one is afraid of them, may not be wholly inadmissible in evidence, no Court should act on a body of such evidence.

* Criminal Reference, No. 2 of 1915, by E. Keays, Offg. Chief Presidency Magistrate of Calcutta, dated Sep. 21, 1915.

without testing the statements of the witnesses and obtaining from them some particulars of the facts on which their general statements are made.

The case of each accused should be differentiated in the evidence and the order of the Court.

PROCEEDINGS were taken against Sheikh Abdul and five others before Mr. Keays, Officiating Chief Presidency Magistrate, under s. 110, cl. (a) and (f), the accusation being that they were habitual thieves and so desperate and dangerous as to render their being at large without security hazardous to the community. The Magistrate after hearing evidence passed, on the 21st September 1915, an order under s. 118 directing each of the above persons to execute bonds in the sum of Rs. 500 to be of good behaviour for three years with two sureties each in the like amount, and in default to rigorous imprisonment for the same period. He referred the case to the High Court under s. 123 of the Criminal Procedure Code.

The case was heard by the High Court on the 21st and 22nd December 1915, and was remanded to the Magistrate, on 3rd January 1916, by the following order :—

"This is a reference under section 123 of the Criminal Procedure Code in the matter of six persons, Sheikh Abdul, Sheikh Doma, Abdul Rahim, Sheikh Cheena, Isak Khan and Sheikh Bombia. Another accused Sheikh Wazid is absconding and so has not been dealt with by the order. The six men above named have each been ordered by the Acting Chief Presidency Magistrate to execute a bond for Rs. 500 and to find two sureties each for Rs. 500 to be of good behaviour for three years, and in default of their so doing to be rigorously imprisoned for three years.

We find ourselves unable to deal with the reference on the record as it stands before us, and we regret to say that this is due to the extremely careless and unsatisfactory manner in which the case has been disposed of by the Court below. The case against all the accused was that they were habitual thieves and desperate and dangerous characters under cl. (a) and (f) of section Some twenty witnesses were called who all came with one refrain 'I know all the accused. They are all pickpockets. Every one is afraid of them' The Sub-inspector, N. C. Chatterjee, then

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intimated that he had examined 97 witnesses and was prepared to call them all. He added (as he ought not to have been allowed to do) that every person he had examined bore out the charges against the accused. After another witness had been examined the Magistrate intimated that sufficient had been called already. He thereupon drew up a general order against the six persons under section 112. The prosecution witnesses were then cross-examined, witnesses were called for the defence and the order the subject of this reference, was passed. It was argued that the procedure followed by the Magistrate was incorrect, but he appears to have proceeded as in a warrant case, and that is the procedure prescribed by section 117 for cases where the order requires security for good behaviour. The accused have not been prejudiced in any way by the form of procedure adopted.

They have, however, good cause for complaint on more substantial grounds. Although under section 117 the fact that a person is an habitual offender may be proved by evidence of general repute or otherwise, and it cannot be said that the very general statements of the witnesses were wholly inadmissible in evidence, still no Court ought to act on a body of evidence such as that before us without making some attempt to test the statements of the witnesses, and obtain from them some particulars of the facts on which their general statements were based. No attempt whatever was made to differentiate the cases of the several accused, though it is obvious that they cannot have been associated in every individual act which each witness may have seen. No attempt was made to distinguish between them either in the evidence or in the order of the Court. An even more serious ground of complaint is with regard to the previous convictions alleged against several of the accused. Previous convictions were alleged against five out of the six, but in no case were those convictions properly proved. These men appear to have many aliases, and in several instances the convictions were in different names from those now borne by the accused. In such cases no satisfactory proof of identity was given. Against Sheikh Bombia no fewer than eight previous convictions were alleged, of which no proof whatever was forthcoming. The reason given at the Bar was that, as he had been convicted in Bombay, it would have taken too long and been too troublesome to get evidence from there. Now the proof of previous convictions is manifestly of the greatest importance in cases like the present. It is impossible to say from the Magistrate's judgment how far, if at all, he took them into consideration. If they had been properly proved and considered, it might have made a great difference between the several accused, one of whom has no previous convictions, while two others are said to have six and eight respectively. We accordingly send back the case to the Magistrate for the recording of further evidence. Some effort should be made to ascertain from the various witnesses what they know against

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each individual accused. All previous convictions alleged should be properly proved. The case of each accused should then be separately considered. The accused will have the right to call such further evidence in their defence, as they may be advised, to meet the fresh evidence that is adduced against them.

The case should be taken up at once and disposed of with as little delay as possible. The Magistrate should then return the case with his opinion upon it to this Court. Pending the hearing the accused may be released on bail to the satisfaction of the Magistrate."

After taking further evidence the Magistrate sent back the record to the High Court with the following opinion :—

"The prosecution have called twenty-one fresh witnesses, twelve of whom solemnly proved the previous convictions against the various accused, and seven were called to prove specific instances of thefts against various accused (some of them did not come up to expectation) and two on subsidiary points.

The prosecution have now proved five previous convictions against first accused, one previous conviction against third accused, two previous convictions against fifth accused, eight previous convictions against sixth accused,

The second and fourth accused have not been previously convicted. The second accused is the nephew of Jamnoon (who has already been bound down as the harbourer) and lives with him.

The additional evidence implicates Sheik Abdul, Doma, Abdul Rahim, Cheena and Bombia. Sheik Abdul is implicated by P. W.'s. 28, 40, 41, and 43 : Doma by P. W. s 28, 40, and 43. ; Abdul Rahim by P. W.'s. 28, 40 and 41 . Cheena by P. W. 41, but this witness merely states that Cheena accompanied Sheik Abdul in a pickpocket expedition. Bombia by P. W. 41, but this witness does not speak to this accused being seen by him actually picking pockets.

All the witnesses who speak to specific acts of thefts admit they did nothing to secure the apprehension of the thieves, and give as their reason that they knew it would be useless as the police were in league with the thieves. In my opinion this additional evidence adduced by the prosecution does not carry the case against the accused very much further. P. W. 31 Manshi Abdul Hamid employed in the Government Printing Press gives Cheena a good character. There is no previous conviction against this accused and the case against him was certainly the weakest; and with the added weight of the character given to him by P. W. 31. I consider he should be discharged. I would call attention to the evidence

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of Superintendent Farrow (P. W. 41) as regards Sheik Abdul Rahim and Bombia. The evidence of this officer appears to me to be of great importance.

There is no evidence against Isak Khan (fifth accused) that he actually picked pockets, and the two previous convictions against him are both for short terms, viz., 2 weeks' R. I. and 3 months' R. I., but both these convictions were for picking pockets.

There is also no evidence against Bombia (sixth accused) that he was actually seen picking pockets, but there can be no question that he is a most dangerous criminal who has come over from Bombay to Calcutta because the former place was too hot to hold him.

As regards the previous convictions against the various accused these were all admitted by the pleaders for the accused at the first trial. I can hardly believe that the procedure adopted in the Police Courts was explained when it is sought to prove previous convictions against accused persons.

It is as follows :—An accused person's finger impression is taken and is sent up to the Central Bureau to see if his antecedents can be traced. If anything is traced against him, a certified copy of the conviction or convictions is then applied for and a police officer is called who produces it. The accused is then asked if he admits the previous conviction, and if he does, he is convicted on that plea. If he denies the previous conviction, an officer before whom he was convicted or a warden in whose jail he served his sentence is called to prove the identity of the accused, and personally I also compare the finger impression of the accused with that produced from the Central Bureau. Had the accused in the present case denied the previous convictions alleged against them, I entirely agree that they would have serious cause to complain, but under the circumstances I respectfully submit they had none. I need scarcely point out that if the procedure which has been in vogue in the Police Courts for at least twenty years is wrong and previous convictions have to be proved in the way they have been proved in this case that it will entail a very heavy expenditure as there are hundreds of cases in our Courts during the year in which the *factum* of a previous conviction has to be taken into consideration

The evidence against the accused was nearly all circumstantial, namely, that they all used to hang about stopping places of the trams and mix up with the crowds and were constantly seen dividing money and articles at Jummian's."

Babu Manmatha Nath Mukerjee (with him *Babu Tarakesur Pal Chowdhury* and *Babu Heramba Chandra Guha*), for the accused. The additional

evidence taken is of the same vague and general character as the original evidence, and its truth cannot be tested by cross-examination or rebutted by defence evidence. It cannot be relied on: *Kalai Halidar v. Emperor* (1). The previous convictions in the case have not been legally proved. The accused have not been allowed a sufficient *locus paenitentiae*: *Junab Ali v. Emperor* (2), *Emperor v. Ranjit* (3).

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Mr. C. R. Das (for the *Standing Counsel*), for the Crown. There is a whole body of evidence which shows the evil repute of the accused. There is no reasonable doubt as to the identity of the persons bound down. The evidence shows that after their release from jail the accused have reverted to their old habits.

Cur. adv. vult.

CHITTY AND WALMSLEY J.J. This reference has now been returned with the further evidence recorded by the learned Second Presidency Magistrate under our order of 3rd January 1916. The learned Magistrate has also, in accordance with that order, recorded an opinion. We regret, however, to find that he has not taken steps to carry out our directions to the full extent. The additional evidence which has been recorded is of very much the same type as the evidence recorded in the first instance of which we had reason to complain, and the statements now made by the additional witnesses do not carry the case much further against anyone of the six accused.

With regard to the statement of the learned Magistrate as to the procedure adopted in the Police Court for the proof of previous convictions, we may say at once that we cannot accept the learned Magistrate's

(1) (1901) I. L. R. 29 Calc. 779. (2) (1904) I. L. R. 31 Calc. 783.
 (3) (1905) I. L. R. 28 M.L. 306.

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suggestion that Presidency Magistrates are absolved from the ordinary rules of evidence in taking proof of such previous convictions. Whenever it is required to prove a previous conviction against a man, whether it be for the purpose of enhancement of punishment under section 75 of the Indian Penal Code or in proceedings under Chapter VIII of the Criminal Procedure Code, such previous convictions must be proved strictly and in accordance with law. Unless they are so proved, no Court—whether it be that of a Presidency Magistrate or not—can properly take such previous convictions into consideration against an accused person.

In the present case the learned Magistrate says that against the accused No. 1, Sheikh Abdul, five previous convictions have been proved: against No. 3, Abdu Rahim one previous conviction: against No. 5, Isak Khan, two previous convictions: and against No. 6. Sheikh Bombia, eight previous convictions. Apart from the proof of previous convictions, with which we will deal in discussing the case of each accused, additional evidence was directed to proving instances of picking pockets against the accused or some or one of them. Speaking generally, we may say that at the second hearing, no attempt was made in the Court below to fix these witnesses to any particular time or detail by which their statements might be tested. Their statements are of the vaguest possible character.

Taking the case of each accused in turn, we start with Sheikh Abdul who has a number of *aliases*. He is said to have been convicted five times. The last conviction was on 20th January 1914, when he was sentenced to one year's rigorous imprisonment under section 379 of the Indian Penal Code. He therefore emerged from jail presumably in January 1915. Since

then there is no evidence of his having committed any offence except the statement of Abdul Wahid (P. W. 40) who says that he saw the first accused pick a pocket once about seven or eight months ago near the statue of Kristo Das Pal, when he was accompanied by accused No. 2. This witness admits that though he saw accused No. 3 throw the purse which had been stolen in Jumman's shop, he did not inform the person whose pocket had been picked. That man, he says, raised a hue and cry, and yet the witness went away without saying anything. This is evidence on which no Court could possibly place any reliance. Another witness Abdul Rahim (P. W. 28) speaking of the accused picking pockets at the crossing of Harrison Road says that he last saw the first three accused picking a pocket about a year and half ago. Allowing due latitude for the statement of a witness of this class when speaking of time, it is impossible that he could have seen the first accused picking a pocket about a year and half ago (he was giving evidence on 24th January 1916), inasmuch as the first accused was safely in jail for almost the whole year 1914. This evidence, therefore, cannot be accepted. It has been held in this Court that accused persons should be given some chance of reforming their characters, and that they should not be proceeded against under this section soon after they have emerged from jail. In this case the first accused had been out of jail for about eight months only when the present proceedings were started. There is no definite evidence of his having committed any offence during those eight months. Though he may be, and possibly is, a man of bad character, we do not think that on evidence such as this an order under section 118 of the Criminal Procedure Code ought to be passed against him.

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The cases against the other accused are much weaker than against accused No. 1. Against Sheikh Doma and Sheikh Cheena no previous convictions at all are alleged. The learned Magistrate himself, who bound down Sheikh Cheena in the first instance, now, on the single statement of the witness Moulvi Abdul Hamid (P. W. 31), who says Cheena is a good man, recommends that he should be discharged. Against these two men the evidence is wholly insufficient to support the order. With regard to Abdul Rahim it appears that he was imprisoned under section 379 of the Indian Penal Code for three weeks on 10th May 1910, *i.e.*, nearly six years ago. Isak Khan was imprisoned under the same section for two weeks on 12th April 1913, and for three months on 13th October 1914. So far as the period which has elapsed between his last release from jail and the commencement of these proceedings, he stands on much the same footing as accused No. 1. Against these two men there is nothing but general statements of witnesses who say that they have seen them picking pockets. They have, however, never taken steps to bring those cases of theft home to the accused. The learned Presidency Magistrate considers that the evidence of Superintendent Farrow (P. W. 11) is of great importance. We are unable to see that it carries the case against the accused of whom he speaks, *i.e.*, Nos. 1, 3 and 6, much further. He says that he often wanted to find them after a man's pocket had been picked but never succeeded. We think, therefore, that the evidence against these two men is also insufficient to justify an order under section 118 of the Criminal Procedure Code.

We come to the case of accused No. 6, Sheikh Bombia, who is said to be a bad character who left Bombay because that place was too hot to hold him,

and is now engaged on the profession of a Christian Clerical. This man is said to have posed under a number of aliases, being sometimes Mahomedan and sometimes Hindu names. No less than eight previous convictions are alleged against him and the learned Marwari considers that they have been proved. We may say at once that, with the exception of the order under section 109 of the Criminal Procedure Code which was passed against the accused at Howrah on 22nd May 1912 when he was sentenced to one year's rigorous imprisonment for being without visible means of subsistence, none of the previous convictions alleged has been properly proved. It was sought to prove the seven previous convictions which were all in Bombay by the evidence of two witnesses, Suresh Chandra Mukerjee (P. W. 33) and K. A. Kumudaker (P. W. 37). The first of these witnesses was a certified expert in finger prints, and he produced what has been marked as Ex. 1 (1) from the Central Bureau. That purports to be a register of the thumb impressions of the accused on the first page and on the reverse his descriptive roll and a list of his previous convictions. No evidence has been recorded as to how this paper comes to be made and lodged in the Central Bureau nor from what particulars the previous convictions on the reverse are recorded and certified. There is, therefore, nothing on this paper except the two certificates at the foot to show that the person convicted seven times in Bombay is the same man as was convicted at Howrah on 22nd May 1912. The witness K. A. Kumudaker is a clerk in the common prison at Bombay. He produced an extract from the jail register showing previous convictions of one Mahomed Hussain, alias Ambalal Amritlal, alias Panz Mahomed, signed by the Superintendent, and certified

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copies,—Exs. 9 (*1 to 5*) of previous convictions of the same man. There is nothing, however, to show that the man who was convicted at Howrah is the same man who was convicted at Bombay. There is a gap here in the evidence to which the learned Magistrate has not alluded and which, when he expresses the opinion that the previous convictions have been proved, he has obviously disregarded. We may notice that the witness K. A. Kumudaker was directed by the learned Magistrate to examine the sixth accused Sheikh Bombia to see if the marks which had been attributed to the convict in Bombay were to be found on the accused Sheikh Bombia and he expresssd the opinion that they were. This was not the proper method of identifying those marks. But there are other difficulties in the way of the proof of these previous convictions. We notice, in the first place, that the first conviction mentioned in Ex. 4 (*1*) is said to have been on 23rd August 1901. The certified copy from Bombay gives the date as 28th August 1901. This, however, may be a slip in copying. In the extract Ex. 4 (*1*) produced from the Central Bureau the age of the accused person is given as 27 years and it is recorded that he has no particular mark. If he was 27 years of age in 1912 and his first conviction was in 1898 it follows that he must have been a boy of about 13 years of age when he commenced his career of crime. The Bombay certificates, however, put him down as 18 in 1898, 25 in 1901, 25 again in 1902 and 30 in 1904. If he appeared to be 30 in 1904 it is difficult to see how he could appear to be only 27 in 1912. With regard to the marks, though no particular mark was attributed to him in the Alipur Jail in 1912, the Bombay convictions all give very definite marks, such as a scar on the right eye-brow, a scar on the right

temple, a scar on the right leg, which marks purport to have been compared by the witness K. A. Kumudaker. They can hardly have been overlooked when his descriptive roll was made out at Alipur in 1912. It may be that the man Sheikh Bombia is the same person as was convicted on previous occasions in Bombay, but it would be idle to maintain that that has been satisfactorily proved in the present case. Some two years elapsed from his release from jail on the Howrah conviction and the commencement of proceedings in the present case. Whether this would be a sufficient time for reformation we do not express an opinion. It was held in the case of *Junab Ali v. Emperor* (1), that fifteen months would not be a sufficient period in which to give a convict an opportunity of reform. Against this accused there are no definite acts of picking pockets alleged, certainly nothing which would point to his having committed that offence on any particular occasion or with regard to any particular individual. The evidence against him is as general and consequently as vague and as weak as that against the other five accused.

We regret to have to come to this conclusion in this case because there are grounds for suspecting that these men are members of a gang, but having regard to the way in which the evidence against them has been recorded and the general state of the record we are quite unable to confirm the Magistrate's order under section 118 of the Criminal Procedure Code. We accordingly set it aside and direct that the six accused be released. In the case of those who are on bail their bail bonds will be discharged.

E. H. M.

(1) (1904) I L R. 31 Calc. 783.

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CIVIL REFERENCE.*Before D. Chatterjee and Beachcroft JJ.*

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April 11.

ABDUL QUADER*v.***FRITZ KAPP.***

Alien Enemy, suit against—If maintainable during the continuance of war—Internment, its object.

It does not matter whether the cause of action arose before or after the war, an alien enemy can be sued in our Courts and has every right to present his case before the Courts in accordance with the laws of procedure.

Halsey v. Lowenfeld (1) followed.

The fact that the defendant has been interned does not make any difference, as the object of internment is to prevent him from doing mischief and not to cut down his liabilities.

THIS was a reference made by Babu Sarat Chandra Ghose, Munsif of Dacca. The facts are simple. The plaintiff is a British Indian subject, a tailor by profession. He sued an interned German for his remuneration for work done. The contract was entered into after the declaration of war and completed before the internment of the defendant.

The defendant entered appearance at first, but subsequently the pleader received no further instruction.

The learned Munsif, before whom the case came on for hearing, referred the following points for the decision of this Court:—

(i) Whether the suit for work done by a British

* Civil Reference No. 1 of 1916, by Sarat Chandra Ghose, Munsif of Dacca, dated Sep. 30, 1915.

subject during the war is at present maintainable against an alien enemy under orders of internment—the contract having been made and the breach thereof having taken place during the war.

(ii) Whether the trial should be suspended until restoration of peace.

No one appeared in support of the Reference.

The Senior Government Pleader (Babu Ram Charan Mitra) opposed the reference. The main question for consideration is whether the suit is maintainable? The latest decision on the point is in the case of *Robinson & Co. v. Mannheim Insurance Co.* (1). Section 83 of the Code of Civil Procedure contemplates the case of an alien enemy as plaintiff and not as defendant. Here the defendant, and not the plaintiff, is an alien enemy. Here, there can be no bar to the suit. The provisions of the Code are not exhaustive in the matter. The present suit is maintainable. Is the contract valid? The contract, being for the necessaries of life, is undoubtedly a valid one. The plaintiff, who is a British subject, should not, indeed, suffer. The contract is enforceable as contracts by infants and other disqualified persons for the necessities of life, are enforceable.

Reading section 9 along with section 83 of the Code of Civil Procedure and taking into account the fact that there is no prohibition, express or implied, in the Code against the maintainability of suits against alien enemies, I submit, that this suit should be allowed.

Cur. adv. vult.

D. CHATTERJEE AND BEACHCROFT JJ. The plaintiff is a British Indian subject, a tailor, in the town of

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Dacca. The defendant, who is a subject of the German Emperor, was a photographer in that town. In November 1914, i.e., after the declaration of war with Germany, the plaintiff did some tailoring work for the defendant and the present suit was brought for the recovery of wages, etc., due on that account. The question referred is whether such a suit would lie during the pendency of the war. We think the suit would lie, and there is nothing in law to prevent its being tried before the restoration of peace.

Section 9 of the Civil Procedure Code provides that the Courts shall have jurisdiction to try all suits of a civil nature excepting suits the cognizance of which is expressly or impliedly barred. Section 83 provides that alien enemies, residing in British India with the permission of the Governor-General in Council, may sue in the Courts of British India, but an alien enemy residing in British India without such permission shall not sue in such Courts. There is no provision in the Code barring suits against alien enemies and we see no reason why such suits should not be heard and decided during the continuance of the war. No matter whether the cause of action arose before or after the war, an alien enemy can be sued in our Courts and would have every right to present his case before the Courts in accordance with the laws of procedure. The latest case in England is that of *Halsey v. Lowenfeld* (1). In that case Mr. Justice Ridley held, after discussing previous cases, that a suit for rent accrued due after the declaration of the war was maintainable in the British Courts against an alien enemy. We see nothing in our own Code of Procedure to prevent us from taking the same view. The fact that the defendant has been interned does not make

any difference as the object of interment is to prevent him from doing mischief and not to cut down his liabilities. The case, therefore, must be tried in due course of law.

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CRIMINAL REFERENCE.

Before Mookerjee and Sheepshanks JJ.

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Criminal Trespass—High Court power of, to allow composition of an offence on revision—Criminal Procedure Code (Act V of 1898), ss. 345 (5), 423 (1) (d), 433—Necessity of criminal intent—Entry on land under bona fide claim of right—Penal Code (Act XLIV of 1860), ss. 441, 447.

The High Court has no power, as a Court of Revision, under s. 439 read with s. 423 (1) (d), to sanction the composition of an offence when entered into after the conviction of the accused.

Adhar Chandra Dey v. Subodh Chandra Ghosh (1), *Sankar Rangayya v. Sankar Ramayya* (2) and *Emperor v. Ram Chandra* (3) followed.

Emperor v. Ram Piyari (4), *Naqvi Ahmad v. King-Emperor* (5), *Nidhan Singh v. King-Emperor* (6), *Ram Sarup v. Emperor* (7) and *Lall v. Emperor* (8) dissented from.

Abadi Begum v. Ali Husen (9) distinguished.

To sustain a conviction under s. 447 of the Penal Code, it is necessary to prove not only entry on land in the possession of the complainant but

* Criminal Reference No. 77 of 1916 by G. N. Ray, Sessions Judge of Burdwan, dated May 17, 1916.

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| (1) (1914) 18 C. W. N. 1212 | (6) (1904) 1 Cr. L. J. 509, |
| (2) (1915) 16 Cr. L. J. 750; | 5 Punj. L. R. 252. |
| 29 Mad. L. J. 521. | (7) (1910) 11 Cr. L. J. 496; |
| (3) (1914) I. L. R. 37 All. 127. | 13 O. C. 161. |
| (4) (1909) I. L. R. 32 All. 153. | (8) (1913) 15 Cr. L. J. 567; |
| (5) (1912) 11 All. L. J. 13. | 17 O. C. 92. |
| | (9) (1897) All. W. N. 26. |

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also one of the intents specified in s. 441. Where a person was charged under ss. 447 and 504 of the Penal Code and convicted only under the former :

Held, that the intent to commit an offence or to intimidate, insult or annoy not having been established, the conviction was bad.

If a person enters upon land in the possession of another, in the exercise of a *bona fide* claim of right without any such intent, he cannot be convicted under s. 447, though he may have no right to the land.

Empress v. Budh Singh (1), *Re Shistidhar Parui* (2), and *Juralkhan Singh v. King-Emperor* (3) followed.

THE accused were tried before a Deputy Magistrate of Burdwan under ss. 447 and 504 of the Penal Code. The complainant alleged that the accused had entered upon his land and erected a fence in order to insult and annoy him. The accused claimed to have erected the same on their own land. The Magistrate held that the evidence was not sufficient to support a conviction under s. 504, but, finding that the land belonged to the complainant and that the accused had encroached thereon, convicted them on the 30th March 1916, under s. 447 and sentenced them to a fine each.

On the 14th April, the accused moved the Sessions Judge to refer the case to the High Court on the ground that it was one of civil and not criminal trespass. On the 12th May, an application was filed by the complainant before the Judge stating that the dispute had been settled, and praying for leave to compound the case. The Sessions Judge thereupon reported the case to the High Court, under s. 438 of the Criminal Procedure Code, recommending the grant of leave to the parties to compound the offence.

No one appeared in the Reference.

MOOKERJEE AND SHEPPSHANKS JJ. This reference, under section 438 of the Criminal Procedure Code,

(1) (1879) I. L. R. 2 All. 101. (2) (1872) 9 B. L. R. App. 19.

(3) (1907) 7 C. L. J. 238.

raises an important question of law which has led to some diversity of judicial opinion.

The petitioners, Akshoy Singh and Akhil Singh, were prosecuted on the complaint of one Rameswar Bagdi before the Deputy Magistrate of Burdwan for offences under sections 447 and 504 of the Indian Penal Code. They were convicted only under the former section and were sentenced to pay a fine of Rs. 10 each, on default to suffer rigorous imprisonment for two weeks. There was also an order under section 545 of the Criminal Procedure Code, that Rs. 5 out of the fine if realized, be paid to the complainant as compensation. This sentence which was passed on the 30th March 1915 was non-appealable. On the 14th April, the petitioners moved the Sessions Judge to call for the record and to recommend to this Court that the conviction be set aside on the ground amongst others that the case was one of civil dispute and not of criminal trespass. The Sessions Judge called for the record and fixed the 12th May for hearing. On that date the complainant filed a petition to the effect that the matter in dispute between the parties had been settled by the intervention of the gentlemen of the locality, that as the case was compoundable it had been compromised, and that his prayer was for leave to withdraw the case. The Sessions Judge reserved his order, and subsequently made this reference with the recommendation that the permission may be given to the parties to compound the case. The question thus arises whether, when an accused has been convicted of a compoundable offence, it is competent to the High Court in the exercise of its powers of revision under section 439 (1) of the Criminal Procedure Code, to grant leave to the parties to compound the offence.

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of the compounding of offences and consists of seven clauses. The first clause specifies the offences which may be compounded and mentions the persons who may compound. The second clause specifies certain other offences which may be compounded only with the permission of the Court before which any prosecution for such an offence is pending. The third clause makes compoundable the abetment of or the attempt to commit a compoundable offence. The fourth clause provides that in the case of a person under disability another person competent to contract on his behalf may compound. The fifth clause defines the stage of the proceeding when an offence may be compounded and is in the following terms: "When the accused has been committed for trial, or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or as the case may be, *before which the appeal is to be heard.*" The sixth clause lays down that the composition of an offence under the section shall have the effect of an acquittal of the accused. The seventh clause finally provides that no offence shall be compounded except as provided by the section. This analysis of section 315 shows clearly that it deals exhaustively with the subject of the composition of offences. With regard to this matter, it defines the persons who may compound, the nature of the offences compoundable, the stage when composition may be made, and the condition under which composition may be effected in the case of some of the offences. The inference is legitimate that, when the Legislature provided in clause (7) that no offence shall be compounded except as provided by the section, the intention was that each of the requirements just mentioned must be fulfilled. Now the fifth clause allows a composition

with the leave of the Court when an accused has been committed for trial, or, when, after conviction, an appeal by him is still pending. There is no reference to a case where after conviction (whether by the first Court or by the Appellate Court where an appeal is allowed by law) an application for revision is pending before the High Court. It cannot be contended for a moment that the Criminal Revisional jurisdiction is included in the Criminal Appellate jurisdiction. It is remarkable that although the Letters Patent divides the civil jurisdiction into original and appellate, thus indicating that the civil revisional jurisdiction is in reality an aspect of the civil appellate jurisdiction [*Secretary of State v. British India Steam Navigation Co.* (1)], clauses 22, 27 and 28 of the Letters Patent clearly differentiate between the original, the appellate and the revisional jurisdiction in criminal cases. The Code of Criminal Procedure also plainly distinguishes between appeals and revision, which form the subject of separate chapters (Chapters 31 and 32). By no stretch of language can we consequently hold that clause (5) of section 345 authorises a composition not merely during the pendency of an appeal, but also during the pendency of an application for revision. We must accordingly answer in the negative the question formulated above. The view we take is in accord with that adopted by this Court in *Adhar Chandra Dey v. Subodh Chandra Ghosh* (2) and by the Madras High Court in *Sankar Rangayya v. Sankar Ramayya* (3). The Allahabad High Court, however, is clearly not of one mind upon this point. The question arose in *Emperor v. Ram Piyari* (4).

(1) (1911) 13 C. L. J. 90, 92-97. (2) (1915) 16 Cr. L. J. 750;

(2) (1914) 18 C. W. N. 1212. 29 Mad. L. J. 521

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Richards J., who heard the case in the first instance, thought it very doubtful whether the High Court, in exercise of its powers of revision, had any jurisdiction to allow a composition and directed a reference to a Bench of two Judges for determination of the question.

Knox and Keramat Hussain JJ. were satisfied that the High Court had the power and based their view on *Abidi Begum v. Ali Husen*(1), a case under section 517 and by no means analogous. No reference was made to the terms of section 345, but reliance was placed upon section 423, clause (d) read with section 139. The question arose again in *Naqi Ahmad v. King-Emperor* (2) where Tulball J. doubted the correctness of the decision in *Emperor v. Ram Piyari* (3) as inconsistent with section 345(5); but as a single judge he felt bound to abide by that ruling. The question came up for consideration again in *Emperor v. Ram Chandra* (4) where Knox J. held, without reference to his previous decision to the contrary effect in *Emperor v. Ram Piyari* (3), that a Court of Revision cannot allow the composition of an offence which had already resulted in a conviction before the proposed settlement. In the Chief Court of the Punjab, the question was considered in *Nidham Singh v. King-Emperor* (5). Chatterjee J. doubted the correctness of the view that a composition could be sanctioned by a Court of Revision, but felt bound to follow two unreported precedents to the contrary. The matter has formed the subject of discussion in two recent cases before the Court of the Judicial Commissioner of Oudh : *Ram Sarup v. Emperor* (6) and *Lall v. Emperor* (7) where

(1) (1897) All. W. N. 26.

(5) (1904) 1 Cr. L. J. 509 ;

(2) (1912) 11 All. L. J. 13.

5 Punj. L. R. 252.

(3) (1909) I. L. R. 32 All. 153.

(6) (1910) 11 Cr. L. J. 496 ;

(4) (1914) I. L. R. 37 All. 127.

13 O. C. 161.

(7) (1913) 15 Cr. L. J. 567 ; 17 O. C. 92.

the decision in *Emperor v. Ram Piyari* (1) was followed without examination of the terms of section 345. It is thus plain that the view that a Court of Revision is competent to grant leave for composition of an offence which has already resulted in a conviction has been followed either with doubt or with reluctance, and always without consideration of the true effect of the provisions of section 345. The supporters of this view have, on the other hand, invoked the aid of section 423, clause (d) which authorizes a Court of Appeal to make any amendment or any consequential or incidental order that may be just or proper; but this is clearly of no real assistance. An order for composition can in no sense be said to be a consequential or incidental order. There are further two weighty considerations against the applicability of section 423 (d). In the first place, it is an elementary rule for the construction of Statutes that when a special provision, obviously exhaustive in its scope, has been made for a special topic, as in section 345, the scope thereof cannot be indirectly enlarged by reference to a general provision, such as that contained in section 423 (d). In the second place, clause (5) was introduced into the Code for the first time in 1898 to meet the effect of the decision in *Empress v. Thompson* (2), and clause (d) was also introduced into section 423 at the same time; if the Legislature had intended that composition of offences should be allowed during the pendency of an application for revision, section 345, clause (5) might have been suitably framed; it is inconceivable that compositions during appeals should have been expressly mentioned and compositions in revision should have been left to be inferred from section 423, clause (d). The position then is that section 139 empowers a

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Court of Revision, not to exercise all the powers of an Appellate Court, as is sometimes loosely expressed, but only such powers as are conferred on a Court of Appeal by sections 195, 123, 126, 427 and 428, that the power to sanction composition of an offence is conferred on a Court of Appeal, not by section 423 (d) or any of the other sections just mentioned but by section 345 (5) and, that, consequently, section 439 which defines the powers of the Court of Revision does not confer on it the power to sanction the composition of offences. We hold accordingly that this Court, in the exercise of its revisional jurisdiction under section 439, is not competent to grant leave to compound an offence under section 345 when such composition has been entered into after the conviction of the accused. We are, therefore, unable to accept the recommendation of the Sessions Judge and to grant leave to the parties to compound the case.

In the view we take, it becomes necessary to consider the propriety of the conviction which, as already stated, is assailed on the ground that the case is really one of civil dispute and not of criminal trespass. The allegation of the complainant was that the accused had put up a fence on his land and blocked his way out and that they had done so with a view to insult and annoy him. The case for the accused was that the fence had been erected on their own land. The accused were accordingly charged under sections 417 and 504 of the Indian Penal Code. The Magistrate held that the evidence was not sufficient to justify a conviction under section 504 of the Indian Penal Code. He then proceeded to consider the charge under section 417 of the Indian Penal Code. Upon the evidence, oral and documentary, he came to the conclusion that the fence had been erected on the land of the complainant and that the accused had thereby encroached on his

land. He held accordingly that the accused were guilty of criminal trespass. This view cannot be supported. To sustain a conviction under section 447, it is necessary to prove, as required by section 441, not only that the accused entered upon the property in the possession of the complainant, but that they did so with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property. No such intent has been proved in this case; the intent which was imputed and was made the foundation of a charge under section 501 has not been established. It is well settled, that if a person enters on land in the possession of another in the exercise of a *bona fide* claim of right without intention to intimidate, insult or annoy the person in possession or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass: *Empress v. Budh Singh* (1), *Re Shistidhur Parui* (2), *Jurakhan Singh v. King-Emperor* (3). The case before us is clearly one of civil dispute, and the Magistrate has not found the elements essential to sustain a conviction under section 447 of the Indian Penal Code. The result is that we set aside the convictions and sentences and direct that the fines, if paid, be refunded.

E. H. M.

- (1) (1879) I. L. R. 2 All 101. (2) (1872) 9 B. L. R. App. 19.
 (3) (1907) 7 C. L. J. 234

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 BAGDI.

CRIMINAL REFERENCE.

Before Mookerjee and Sheepshanks JJ.

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May 31.

TAYEBULLA

v.

EMPEROR.*

Sanction for Prosecution—Information to the police reported false—No subsequent application to the Magistrate for judicial investigation—Order of Magistrate calling on informant to prove case, and examination of witnesses—Grant of sanction—Necessity of sanction when false charge made to the police but not followed by complaint—"Complaint"—Power of Magistrate to direct prosecution himself in such case—"Judicial proceeding"—Criminal Procedure (Code, Act V of 1898) ss. 4 (h), 195 (1) (b), 476.

No sanction is necessary under s. 195 (1), (b) of the Criminal Procedure Code to prosecute an informant under s. 211 of the Penal Code when a false charge has been made by him only to the police.

Karim Bakhsh v. King-Emperor (1), *Bhimaraja Venkateswarulu v. Moova Bapulu* (2), *Emperor v. Sheikh Ahmed* (3) followed.

But sanction is requisite under the section when he has subsequently preferred a complaint to the Magistrate praying for judicial investigation.

Queen-Empress v. Sham Lall (4), *Jogendra Nath Mookerjee v. Emperor*, (5) *Queen-Empress v. Sheikh Beari* (6) followed.

When a person who has laid an information before the police, reported to be false, has not subsequently applied to the Magistrate for an investigation or has not impugned the correctness of the police report and prayed for a trial, he has not made a "complaint" within the meaning of s. 4 (h) of the Code.

An order for prosecution cannot be made under s. 476 of the Criminal

* Criminal Reference No. 78 of 1916, by J. H. A. Street, Additional Sessions Judge of Sylhet, dated May 17, 1916.

(1) (1904) 2 Cr. L. J. 66.

(2) (1912) 13 Cr. L. J. 480.

(3) (1911) 13 Cr. L. J. 578.

(4) (1887) I. L. R. 14 Calc. 707.

(5) (1905) I. L. R. 33 Calc. 1.

(6) (1887) I. L. R. 10 Mad. 232.

Procedure Code when the alleged offence under s. 211 of the Penal Code has not been committed in Court, but in relation to a police investigation only.

Dharmidas Kaur v. King-Emperor (1). *Jadunandan Singh v. King-Emperor* (2) followed.

The procedure of calling on the informant, who is reported by the police to have made a false charge before them, to prove his case and the examination of witnesses is not contemplated by the Code, and the proceeding is not a judicial one within s. 476 of the Code.

Mouli Darzi v. Naurang Lall (3) followed.

ON the 17th January 1916, one Tayebulla laid an information at the Mouli Bazar thana charging Karam Sheikh and two others with theft of paddy. The Inspector of Police, after investigation, reported the case to be false, on the 31st, but stated that there was no evidence to prosecute the informant under s. 211 of the Penal Code. The latter did not thereafter file a complaint before the Subdivisional Officer impugning the correctness of the police report and praying for a judicial inquiry or trial, but the Magistrate, on receipt of the police report, passed an order, on the 12th February: "Complainant to prove case." The Magistrate then examined witnesses, as to the truth of the original charge, on the 18th March, and directed the police "to adduce evidence on 5th April to prove that the case was maliciously false." On the latter date, after hearing further witnesses, the Magistrate recorded an order dismissing the "complaint" under s. 203 of the Criminal Procedure Code, and granting sanction for the prosecution of the complainant.

The Additional Sessions Judge of Sylhet, thereupon, referred the case to the High Court, under s. 438 of the Criminal Procedure Code, by his letter, dated the 17th May, recommending the quashing of the sanction order.

No one appeared in the Reference.

(1) (1908) 7 C. L. J. 373.

(2) (1909) 10 C. L. J. 564.

(3) (1900) 4 C. W. N. 351.

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MOOKERJEE AND SHEEPSHANKS JJ. This is a reference under section 438 of the Criminal Procedure Code by the Additional Sessions Judge of Sylhet. On the 17th January 1916, the petitioner laid a first information, under section 151 of the Criminal Procedure Code, at the Moulvi Bazar police-station against Karam Sheik and others, and alleged that they had stolen his paddy and had thereby committed a cognizable offence under section 379 of the Indian Penal Code. The police investigated into the matter, and, on the 31st January, submitted a final report under section 173, to the effect that the case appeared to be false and that there was no evidence for false prosecution. The Subdivisional Officer, on receipt of this report, passed an order on the 12th February in the following terms: "Complainant to prove his case." It will be observed that the complainant had not applied to the Magistrate to investigate into the matter. On the 18th March, the Magistrate examined four witnesses, and ordered the police "to adduce evidence on the 5th April to prove that the case was malicious." On the day fixed, six more witnesses were examined. The Magistrate then recorded the following order: "It is evident from their depositions that there is a party feeling in the village, but the witnesses examined by the complainant had suppressed it. The complainant has totally failed to prove his case. I declare the case to be maliciously false and dismiss it under section 203. I sanction the prosecution of the complainant Tayebulla under section 211 of the Indian Penal Code." The Sessions Judge has, on the application of Tayebulla, recommended that the order be set aside. It is plain that the order for sanction cannot be supported.

No sanction was required in this case under section 195 (1) (b). A sanction is requisite in respect

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of an offence under section 211 of the Indian Penal Code, only when such offence has been committed in or in relation to any proceeding in any Court; no sanction is necessary when a false charge has been made to the police and has not been followed by a judicial investigation thereof by a Court: *Karim Bakhsh v. King-Emperor* (1), *Bhimaraja Venkateswarulu v. Moova Bapulu* (2), *Emperor v. Sheikh Ahmed* (3). The position is different where, upon the police report as to the falsity of the complaint, the complainant insists upon a judicial investigation; if he does so, he is deemed to have preferred a complaint to the Magistrate. If the Magistrate finds his case to be false, a sanction would be requisite under section 195 (1) (b), as the offence may be said to have been committed in a proceeding in a Court: *Queen-Empress v. Sham Lall* (4), *Jogendra Nath Mookerjee v. Emperor* (5), *Queen-Empress v. Sheikh Beari* (6). In the case before us, the petitioner never applied to the Magistrate for investigation; he did not impugn the correctness of the police report nor did he pray that the person accused by him might be brought to trial. He was never examined on oath by the Magistrate: he cannot by any stretch of language be deemed to have made a "complaint" under section 1 (h); and it is difficult to understand what the Magistrate meant when he dismissed the case under section 203. It is thus clear that the order for sanction to prosecute is bad, if it be deemed to have been granted under section 195. The order is equally bad, if we hold that the Magistrate has inaccurately expressed himself, and that what he really intended was to make an order under section 176 (1). In the first place, as pointed out in

(1) (1904) 2 Cr. L. J. 66.

(4) (1887) I. L. R. 14 Calc. 707

(2) (1912) 13 Cr. L. J. 480.

(5) (1905) I. L. R. 33 Calc. 1.

(3) (1911) 13 Cr. L. J. 378.

(6) (1887) I. L. R. 10 Mad. 232.

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Dharmadas Kawar v. King-Emperor (1) and *Jadunandan Singh v. King-Emperor* (2), section 476 must be read with section 195, and is consequently restricted by the limitations contained in clause (b) of that section. An order for prosecution under section 476 cannot thus be made where the alleged offence under section 211 has been committed not in Court but in relation to a police investigation. In the second place, a Court is competent to take action under section 476, only when the alleged offence has been committed before it or brought under its notice in the course of a judicial proceeding. Here the alleged offence was not committed in Court: nor was it brought to the notice of the Magistrate in the course of a judicial proceeding. The report by the police was not under section 157 so as to entitle the Magistrate to proceed under section 159. The procedure he adopted is not contemplated by the Code: *Mouli Durzi v. Naurangi Lall* (3). There was thus no judicial proceeding before him, and he could not consequently have taken action under section 476. It follows accordingly that his order cannot be sustained either under section 195 or under section 476. We must, therefore, accept the recommendation of the Sessions Judge and set aside the order of the 5th April 1916.

E. H. M.

- (1) (1908) 7 C. L. J. 373. (2) (1909) 10 C. L. J. 564.
 (3) 1900 4 C.W.N. 351.

INSOLVENCY JURISDICTION.*Before Greaves J**Re SITAL PRASAD AND OTHERS.**

1916

Insolvency—Minor—Infant, whether can be adjudicated as insolvent.

June 16.

An infant cannot be adjudicated an insolvent under any circumstances.
Ex parte Jones (1) followed.

THIS was an application by Gowri Sankar, Kedarnath and Juggernath to set aside the orders adjudicating them insolvents. The applicants, along with certain other persons with whom they were alleged to have been carrying on business in co-partnership, were adjudicated insolvents by two several orders dated the 22nd November, 1911, and the 29th January, 1912, Gowri Sankar having been adjudicated by the first order and the other two applicants by the second. Subsequently these two insolvency proceedings were consolidated. The present application was to set aside the orders of adjudication, so far as the applicants were concerned, on the ground that they were infants at the dates when the orders made against them respectively were passed. The application was opposed by certain secured creditors.

Babu Subodh Chunder Mitter (Attorney for the applicants). My clients were infants when the orders of adjudication were made against them and so they cannot be adjudicated insolvents. I rely on *Ex parte Jones* (1), *In re Nobodeep Chunder Shaw* (2) and *In re Hansraj Malji and Narandas Dayal* (3).

* Insolvency Jurisdiction No. 250 of 1911.

(1) (1881) L. R. 18 Ch. D. 109 (2) (1886) I. L. R. 13 Calc. 68.
 (3) (1883) I. L. R. 7 Bom. 411.

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Mr. M. Zorab, for the secured creditors. The Insolvency Act does not expressly exclude an infant from its operation. *Ex parte Jones* (1) no doubt lays down the rule with regard to the matter so far as the English law is concerned, but certain exceptions to the general rule are recognised in the English law, for example, with regard to necessaries supplied to an infant or with regard to judgment debts in an action for a tort: see Williams on Bankruptcy, 11th edition, p. 4. Under the Indian Contract Act, the liability incurred for necessities supplied is laid down in section 68. The liability of an infant partner is laid down in section 247. In both instances the infant is not personally liable but his property is, and the whole question is whether an infant partner is a debtor. I submit he is a debtor, although the creditor has not got against him all the remedies which he has in other cases. *In re Nobodeep Chunder Shaw* (2) and *In re Hansraj Malji and Narandas Dayal* (3) merely follow *Ex parte Jones* (1) and do not discuss the question at all.

Mr. S. K. Chuckerbutty, for the Official Assignee left the matter to the judgment of the Court.

GREAVES J. This is an application on behalf of Gowri Sankar and two other partners in the firm Kedarnath and Juggernath who were adjudicated insolvents on the 29th January 1912, Gowri Sankar having been adjudicated on the 22nd November 1911, and these two insolvency proceedings have been consolidated. The application now before me is to set aside the order of adjudication, so far as these three persons are concerned, on the ground that they were infants at the date when the orders of adjudication

(1) (1881) L. R. 18 Ch. D. 109. (2) (1886) I. L. R. 13 Calc. 68.

(3) (1883) I. L. R. 7 Bom. 411.

made against them respectively were passed. It appears that an order was passed in the Court of the District Judge of Ghazipur under section 7, Act VIII of 1890 (The Guardians and Wards Act), on the 11th December, 1909. These three persons were minors on that date and Gowri Sankar attained his majority in the year 1916, and the other two infants will attain their majority in the years 1925 and 1928 respectively, and by virtue of the order of the District Judge of Ghazipur the age of majority of the infants will be 21. The application is opposed by certain secured creditors who have obtained an order for sale for the purpose of realising their securities under Schedule II, rule 18 of the Presidency Towns Insolvency Act, and I was referred to two sections of the Contract Act, viz., section 68, which provides that if a person incapable of entering into a contract is supplied with necessaries, the person supplying the necessities is entitled to be reimbursed from the property of the person incapable of so contracting, and also to section 217 of the Contract Act, which provides that a person who is under the age of majority may be admitted to the benefits of the partnership but cannot be made personally liable for any obligation of the firm, and the argument addressed to me founded upon these two sections was that the infants, who are rendered liable under these sections, must be debtors, or otherwise there would be no right against their property under those sections. I think that argument is not well-founded. I do not think that the sections pre-suppose that they are debtors. In the case of infants who are under a disability, the law in this country, to prevent hardships arising in the case of supply of necessities, or in the case of a family partnership, has provided special remedies against their property, but I do not think for a moment that they are debtors and so the

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distinction that counsel, who appeared for the secured creditors, sought to make with regard to the English case *Ex parte Jones* (1), the passage to which he referred being at p. 119, does not seem to me well founded.

GREAVES J.

I do not think that the law contemplates that an infant should be adjudged an insolvent, although there is a passage in Williams on Bankruptcy, 11th Edition, p. 4, in which it is suggested that in respect of judgment-debts or necessities an infant may be so adjudicated, but there is no decision which so lays down, and I do not propose to so decide in the absence of any authority for the proposition. My own view is that the infant cannot be adjudged an insolvent under any circumstances, and so I grant the application and set aside the orders of adjudication made against Gowri Sankar and the other applicants, Kedarnath and Juggernath. So far as the costs of the secured creditors are concerned, they can add their cost; of their appearing here to their securities, and I make no order against Raghbir or against the infants themselves. The Official Assignee will take his costs out of the assets in his hands.

A. K. R.*Application allowed.*

Attorney for the applicants: *Subodh Chunder Mitter.*

Attorney for the secured creditors and the Official Assignee: *J. A. Arnowitz.*

(1) (1881) L. R. 18 Ch. D. 109, 119.

CRIMINAL REVISION.

Before Sanderson C. J., and Walmsley J.

MOHAMMED KAZI

v.

EMPEROR.*

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July 25.

Rescue from lawful Custody—Lawful apprehension resistance to—Opium—Person selling article as opium which turns out not to be the same—Arrest and detention of such person—Legality of arrest—Escape from such arrest—Opium Act (1 of 1878) s. 15, Penal Code (Act XLV of 1860), ss. 224 and 225.

Where a person purports to sell an article as opium which afterwards turns out not to be the same and he is arrested but escapes with the aid of others :—

Held, that his arrest and detention are lawful under s. 15 of the Opium Act (1 of 1878), and that his conviction under s. 224 and that of the others under s. 225 of the Penal Code are legal.

It is an offence for a person to escape from custody, after he has been lawfully arrested on a charge of having committed an offence, although he may not be convicted of such latter offence.

Deo Sahay Lal v. Queen-Empress (1) approved

ON the 5th January last the excise authorities, suspecting the first petitioner Mohammed Kazi to be an illicit opium-dealer, arranged with some persons to purchase some opium from him. They went to his house and he sold them some balls of a black substance representing the same to be opium. An excise officer present, thereupon, arrested him and was taking him to the excise sampan when the officer and his party were attacked by a body of men armed with *tathis*, including the petitioners other than Mohammed Kazi, and the latter was forcibly rescued.

* Criminal Revision, No. 515 of 1916, against the order of J. C. Twidell, Sessions Judge of Chittagong, dated April 15, 1916.

(1) (1900) 1 L. R. 28 Calc. 253.

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Mohammed Kazi was placed on trial under s. 9 of the Opium Act and convicted, but the High Court on revision set aside the conviction on the ground that the article sold by him was not in fact opium within the meaning of the Act, though it contained a small percentage of the same (1).

The petitioners were then tried by the Sub-divisional Officer of Cox's Bazar, Chittagong, all under s. 147 of the Penal Code, and in addition Mohammed Kazi under s. 224 of the Code, and the rest under s. 225. On the 27th March, 1916, the Magistrate acquitted one of the petitioners and convicted and sentenced Mohammed Kazi under s. 224 of the Penal Code to one year's rigorous imprisonment. The others were convicted under ss. 147 and 225 of the Penal Code, four of them being sentenced, under s. 147 only, to one year's and the last to six months' rigorous imprisonment. They appealed to the Sessions Judge of Chittagong who, by his order dated the 15th April 1916, maintained the convictions and sentences. The petitioners thereupon moved the High Court and obtained the present Rule.

Mr. S. R. Das (with him *Babu Chandra Sekhar Sen*), for the petitioners. Mohammed Kazi was not at the time of his arrest "charged" with any offence by the excise officer. The word "charged" in s. 224 of the Penal Code refers to a formal charge. Under s. 15 of the Opium Act the officer can only detain and search a suspect, but has no power to arrest him unless opium is in fact found in his possession. The arrest was, therefore, unlawful and his conviction under s. 224 of the Penal Code bad: *Deo Shahay Lal v. Queen-Empress* (2).

The Offg. Deputy Legal Remembrancer (Mr. Camell), for the Crown. No formal charge is necessary. An accusation of an offence at the time of the arrest is sufficient. Mohammed Kazi represented the balls to be opium and cannot now turn round and say they were not such.

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SANDERSON C. J. In this case the first accused Mohammed Kazi, was charged with an offence under section 224 of the Indian Penal Code, that is to say, with intentionally offering resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged, or escaping from any custody in which he is lawfully detained for any such offence; and the other accused were charged with an offence under section 225, that is to say, with intentionally offering resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescuing any other person from any custody in which that person is lawfully detained for an offence. All of them were also charged under section 147 of the Indian Penal Code, the common object alleged being to rescue Mohammed Kazi from lawful custody.

Now, the facts of the case may shortly be recapitulated as follows. The accused, Mohammed Kazi, was suspected of being in possession of opium contrary to the Opium Act; and certain persons were put forward by the excise officer as apparent purchasers of opium from the accused No. 1, Mohammed Kazi, and in pursuance of such apparent purchase, certain balls of black substance changed hands. Thereupon, the first accused, Mohammed Kazi, was arrested by the excise officer. On the way to the place where the *sampan* was moored, the excise officer and the others, who were with him, were attacked by a body of men who were carrying *lathis*, and that body of men included

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the accused other than Mohammed Kazi. The result was that the accused No. I was rescued by force.

A case was then made against the first accused, Mohammed Kazi, under section 9 of the Opium Act, alleging that he was unlawfully in possession of opium. He was convicted. On revision by this Court, that conviction was set aside on the ground that the substance which Mohammed Kazi purported to sell to those persons, who were put forward by the Excise officer, was not in fact opium; the black substance which was sold did contain a very small percentage of opium; but we came to the conclusion that what he had sold and had been in possession of was not in fact opium within the meaning of the Act, and consequently the conviction against Mohammed Kazi under section 9 of the Act was set aside(1).

What he had really been doing, as far as I can understand the facts, was that he was attempting to pass off this black substance as opium, purporting to sell it to the persons who were put forward by the excise officer as the apparent purchasers.

Then the present charge came to be investigated. The charge against the first accused was under section 224 and against the other accused under section 225 and against all of them under section 147.

A point was then taken that Mohammed Kazi, not having committed any offence under section 9 of the Opium Act, was *not in lawful custody at the time of his rescue.*

Now, the excise officer was acting under section 15 of the Opium Act. That section provides, first of all, that any officer of the said department "may seize, in any open place or in transit, any opium or other thing which he has reason to believe to be liable to confiscation under section 11 or any other law for

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the time being in force relating to opium," and "detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and, if such person has opium in his possession, arrest him and any other persons in his company." It was the latter portion of the section under which the excise officer acted, namely, "if such person has opium in his possession, arrest him and any other persons in his company." Mohammed Kazi had purported to sell what he alleged was opium: and, consequently, the excise officer arrested him acting under section 15 of the Opium Act. If the substance had in fact been opium, Mohammed Kazi would have been guilty of an offence under section 9 of the Act, and there could be no doubt whatsoever about the legality of the excise officer's act in arresting him. How then can Mohammed Kazi, being himself responsible for his arrest by alleging that the substance which he was selling was opium, turn round and say that his arrest was illegal, alleging that what he was selling was not opium, although at the time he made the sale he passed it off as opium. To give effect to such an argument would lead to a conclusion which is ridiculous. Consequently, we are of opinion that the arrest was legal and that Mohammed Kazi was in lawful custody at the time of the rescue.

In support of this conclusion I may refer to the case of *Deo Sahay Lal v. Queen-Empress* (1) (the passage being at 255), where Mr. Justice Pratt, and Mr. Justice Brett, said "having regard to the context" (they are dealing with section 224), "we think that the words 'for any such offence' must mean 'for any offence with which he is charged or of which he has been convicted.' So that it would be an offence for a

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man to escape from custody after he had been lawfully arrested on a charge of having committed an offence, although he may not be convicted of such latter offence."

For these reasons, I am of opinion that the first accused was in lawful custody, he was lawfully detained and when he effected his escape he committed an offence under section 224.

It follows from this that the other accused who rescued the first accused from the abovementioned lawful custody were guilty of an offence under section 225. The learned Judge in concluding his judgment said this: "The evidence shows that Mohammed Kazi, after escaping from the hold of two excise peons; joined in beating the excise men. The other appellants were members of an unlawful assembly with the common object of rescuing Mohammed Kazi from lawful custody and joined in inflicting injuries on members of the excise party in order to effect and to safeguard his escape. The convictions are, therefore, within the scope of sections 224, 225 and 147 of the Indian Penal Code. The attack was of a dangerous nature and shows that the perpetrators have little regard for law and order. The sentences are not too severe." I entirely agree with this summary of the learned Judge.

For these reasons, I think that this Rule should be discharged.

WALMSLEY J. I agree.

E. H. M.

Rule discharged.

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